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SUPREME COURT OF THE UNITED STATES
October Term 1975

No. _____

UNITED TRANSPORTATION UNION
LODGE NUMBER 550, an unincorporated
association,

and

UNITED TRANSPORTATION UNION,
an unincorporated association,

Petitioners

v.

ROBERT ROCK, EZELL B. JOHNSON,
and RUSSELL C. WALKER, each
individually and on behalf of all others
similarly situated

and

UNITED TRANSPORTATION UNION LOCAL
NUMBER 974, an unincorporated association,

Respondents

PETITION FOR WRIT OF CERTIORARI FROM
THE FOURTH CIRCUIT COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, United Transportation Union Lodge Number 550 and United Transportation Union, hereby petition for a Writ of Certiorari to review the decision of the Fourth Circuit Court of Appeals made on September 22, 1975.

OPINIONS BELOW

The District Court's original decree, dated April 28, 1972, which was never officially reported, is attached hereto in the appendix. The first decision of the Fourth Circuit Court of Appeals (473 F. 2d 1344 [4th Cir.], cert. denied, 412 U. S. 993 [1973]) is also attached hereto in the appendix.

The remand opinion of the District Court, dated May 17, 1974, which was never officially reported, is attached hereto in the appendix. The second opinion of the Fourth Circuit Court of Appeals, _____F. 2d _____, is also attached hereto in the appendix, and is the decision for which review is sought.

JURISDICTION

The judgment sought to be reviewed was made by the Fourth Circuit Court of Appeals on September 22, 1975. A petition for rehearing was filed on October 6, 1975, and was denied by two of the three Judges on December 1, 1975, a copy of which order is in the appendix attached hereto. There was no extension granted to file this Petition for Certiorari. On or about

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December 11, 1975, the Fourth Circuit Court of Appeals stayed its mandate to permit petitioners to file application for a Writ of Certiorari. The statutory provision believed to confer jurisdiction on the Court to review the judgment in question is 28 U. S. C. A. §1254 (1). The District Court had jurisdiction pursuant to the provisions of 42 U. S. C. A. 2000e - et seq., commonly known as Title VII of the Civil Rights Act.

ISSUES

Issue Number One. Has the Court of Appeals violated traditional notions of appellate review and the recent directives of the United States Supreme Court by ignoring or changing the District Court's findings of fact?

Issue Number Two. Is there a conflict within the Fourth Circuit and among other circuits with regard to the nationally important issue of seniority rights, i.e., can the remedy fashioned by the Court to correct past discrimination be in itself discriminatory and contrary to previously guaranteed contractual rights?

STATUTE INVOLVED

The Statute involved is the equal employment opportunity chapter of the Civil Rights Act found in 42 U. S. C. A. 2000e-et seq. The provisions of the chapter that are directly involved include:

1. 42 U. S. C. A. 2000e-2

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin;

or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin . . .

(c) It shall be un unlawful employment practice for a labor organization

(1) to exclude or to expel from its membership, or otherwise discriminate against, any individual because of his race, color,

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religion, sex or national origin;

(2) to limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of section . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to

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differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206 (d) of Title 29.

2. 42 U. S. C. A. 2000e-5 (g)

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account

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of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

A. Statement of Material Proceedings.

On June 2, 1969, plaintiffs filed a complaint in the United States District Court for the Eastern District of Virginia, Norfolk Division, against the Norfolk and Western Railway Company, alleging violation of the Equal Employment Opportunity provisions contained in Title VII of the Civil Rights Act of 1964 (42 U. S. C. A. §2000e). On December 20, 1969, the plaintiffs, including Russell C. Walker, filed an amended complaint making the same allegations against N & W, and joining the United Transportation Union (UTU) and Lodge 550.

Defendants N & W, UTU and Lodge 550 filed answers to the amended complaint denying the plaintiffs' substantive allegations generally. By order of the District Court on November 6, 1970, the class was defined to include "any Negro employee of the Norfolk and Western Terminal who finds himself discriminated against."

The action came on for trial, which lasted four days, and on January 20, 1972 the District Court handed down its Memorandum Opinion, which outlined the Court's views and directed the parties to submit proposals which the Court would then use in formulating its decree. Sustaining certain of plaintiffs' allegations of discrimination and rejecting others,

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the Court called for the adoption of a "topping and bottoming" type plan for rearrangement of the existing seniority system to go with provisions to encourage blacks to advance. The Court found post-1965 discrimination with respect to the N & W hiring practices, and ordered injunctive relief. The Court further found that maintenance by the UTU of segregated local lodges was discriminatory, and ordered their merger to a single lodge. The Court denied plaintiffs' claim for back pay, but awarded the plaintiffs attorneys' fees based on the relief granted. The final decree was entered by the Court on April 28, 1972, and plaintiffs filed a notice of appeal.

On February 20, 1973 the Court of Appeals handed down its opinion on the first appeal of this case (473 F. 2d 1344[4th Cir.], cert. denied, 412 U.S. 993 [1973]). The Court of Appeals found that the defendants had violated the Act and affirmed the finding of the District Court in that respect. As to the N & W, the Court of Appeals stated: "As a result of the employment practices followed by the defendant railroad, prior to 1965, the two yards were racially identifiable," and further ruled that "the findings by the District Court that, in its hiring practices, the defendants had violated the Act . . . is not clearly erroneous and is accordingly affirmed." Further, the Court of Appeals found that since ". . . District Court was clearly right in ordering a merger of the local unions covering the employees in the two yards . . . its action in this respect is affirmed." The Court further concluded that the issue on appeal revolved about the manner in which, accepting a finding of a violation of the Act, the seniority rosters of the two yards should

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be merged. In response, the Court of Appeals found that a "dovetailing" merger plan was an appropriate remedy under the circumstances of the case. In discussing such a merger, the Court stated that:

> "A single terminal seniority roster should necessarily provide for the preservation of the rights of all incumbent employees at both yards, and would permit no displacement of incumbent employees. It would be limited in operation to bidding for future vacancies in either yard, and, as plaintiffs concede, would remain subject to the overriding considerations of basic job competency. With particular reference to the right of Barney Yard brakemen to qualify for promotion to conductors, any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this higher classification, not give such brakemen any higher or broader rights than those enjoyed or granted to CT Yard brakemen, who had qualified for promotion to conductor." (Emphasis supplied). (A-52, this appendix).

Further, the Court of Appeals remanded the matter of the right of the plaintiffs to back pay, since it concluded that the plaintiffs were entitled to a more liberal form of merger, and ordered the District Court to make specific findings on the conflicting claims of the parties

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on that issue. Also, the matter of attorneys' fees was remanded for further proceedings in the District Court.

After the Court of Appeals' initial decision, the UTU filed a Petition for a Writ of Certiorari to this Court and raised two issues: (1) Does the "dovetailing" remedy as ordered by the Courth Circuit Court of Appeals conflict with similar remedies involving substantially the same facts in other courts of appeal? and (2) Does Title VII of the Civil Rights Act permit the displacement of existing employees in granting remedial relief?

On June 4, 1973 this Court denied the Petition for a Writ of Certiorari and the case was remanded from the Court of Appeals to the District Court.

On October 4, 1973 the District Court conducted a day-long remand trial (A-II, 50-323), and after receiving post-trial briefs and hearing oral argument, the District Court issued its Opinion and Order on May 17, 1974 (A-56, this appendix).

The District Court's order provided for a dovetailing of the seniority rosters based on date of hire for brakemen, date of promotion for conductors and date of promotion for car retarder operators, which is consistent with the manner in which those respective seniority rosters are made up in the first place.

The Court, in its discretion, refused to order back pay to plaintiff class. In doing so, the Court relied on (a) its finding that the yards

themselves had not been ordered merged, and its finding that, while progression may be slower in one yard than another, it is a function of the nature of the work and not a result of the racial characteristics of those laboring therein. The Court further found that (b) the N & W made a bona fide offer to dovetail the rosters in 1968, and the plaintiff class refused such offer, not wanting to voluntarily chance a loss of seniority by any dovetailing. Further, the Court found that (c) the economic disparities reflected in the exhibits introduced by the plaintiffs at the remand hearing were products of economic factors, such as the lack of coal exports, which shut down employment and slowed down promotions, and were not the products of racial prejudice. The reasons, then, for slower promotion rates for Barney Yard men as alleged by the plaintiffs are pure speculation. Finally, the Court found (d) that the two racially identifiable yards were a result of the nepotistic hiring practices of the N & W, and that such hiring practices were the result of hiring by word of mouth from family to family and from friend to friend. Such nepotistic hiring was found to be not so legally sinful as it was a source of abrasion which would be stopped by merger of the rosters.

The Court also rejected the plaintiffs' request for an upward adjustment of their monthly guarantees under the Nickel Plate Merger Plan, since this matter had never been mentioned until February 1974 in final argument of this case on remand.

The parties having agreed on the matter of attorneys' fees, that issue was resolved.

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The plaintiffs appealed a second time to the Fourth Circuit Court of Appeals on May 29, 1974, challenging the District Court's denial of back pay, the merger of the conductors' seniority rosters on the basis of date of promotion to conductor, and the refusal of the District Court to give effect to the Nickel Plate Merger Agreement, which was raised for the first time on oral agrument at the conclusion of the case on remand.

The Fourth Circuit Court of Appeals, in its decision handed down September 22, 1975, remanded the case once again to the District Court with instructions to (1) award back pay against the N & W and to decide whether the Unions should share in payment of the back pay award (2) to merge the conductor seniority rosters, not on date of promotion to conductor, but on date of hire with the company, and (3) to consider the Nickel Plate Merger Agreement in the back pay award. (A-84, this appendix). The Court of Appeals then denied both defendants' Petitions for Rehearing. (A-117).

From this decision of the Fourth Circuit Court of Appeals, the UTU seeks the review of this Court.

Robert Rock, Ezell B. Johnson and Russell C. Walker and Local 974 of the United Transportation Union shall hereinafter be referred to as the "plaintiffs;" defendant Norfolk and Western Railway Company shall be hereinafter referred to as the "N & W;" United Transportation Union and Lodge Number 550 shall hereinafter be referred to as "UTU" and "Local 550." All page references will be made

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to the printed record used in the Court of Appeals, except where reference is made to the appendix in this Petition. Page references preceded by "A-I" are from the appendix from the first appeal, and those preceded by "A-II" are from the appendix from the second appeal; references to "A - " are to the appendix in this petition.

B. History of the Case as it Relates to Back Pay.

When questioned in the first trial about particular incidents of hiring discrimination, Larry W. Walker (A-I, 147a), George Hines (A-I, 192a), Maurice T. Haynes (A-I, 221a), and M. N. Harris (A-I, 258a) testified that they applied for jobs because friends and relatives working in the Barney Yard informed them that the N & W was hiring on the Barney Yard. Thus, members of the plaintiff class, had, by the plaintiffs' own evidence, and independent of any acts of the UTU and Local 550, perpetuated the hiring of blacks in the Barney Yard by simple word of mouth. For example, C. A. Glass states:

> "Generally the railroad is . . . a friend to friend affair. I imagine that I will draw at least 50 percent of applicants from relatives or friends of now present employees. They will bring them up or call me up and ask me if I am hiring, things of that nature." (T-511)

The record is void of any evidence that the defendants UTU and Local 550 had any

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authority in hiring, or that they interferred in any way with the hiring or other personnel policies of the N & W. In its findings of fact (A-12), the District Court accepted the fact that the racial make-ups of the two yards came about as a result of the nepotistic hiring practices of the N & W, and that such hiring practices continue in the new hires the racial identity of the two yards.

The evidence sustains the finding by the District Court that the UTU maintained segregated locals and as a result of the first trial of this case and of the District Court's order thereupon, Local 974 and Local 550 were merged into Local 48. Contrary to the plaintiffs' allegation in their complaint that the UTU maintained segregated locals which deprived Negro employees of employment opportunities (A-I, 88a), the evidence showed that the place where a man worked -- Barney Yard or CT Yard -- determined the lodge that he belonged to, but the converse did not apply, and the individual's race or color was not a factor (A-I, 296a). In other words, the individual was hired and placed in a particular yard, and as a result of that placement he became a member of either Local 974 or Local 550 after he had become an employee in his particular yard. The admitted segregated locals, which were long ago corrected pursuant to the District Court's order, had nothing whatsoever to do with promotional opportunities or employment opportunities. The District Court did not so find, the plaintiffs have not so argued, and the Court of Appeals has not so found.

The Court of Appeals, in the first appeal, upheld the above findings of fact of the

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District Court, and said:

> "The findings by the District Court that, in its hiring practices the defendants have violated the Act . . . is not clearly erroneous and is accordingly affirmed." 473 F. 2d 1344 (A-47,48)

At the conclusion of the remand of this case, the District Court found as a matter of fact that the N & W made a bona fide offer to dovetail the rosters in 1968, and "this was communicated to the Unions. The proposition was turned down by the Unions," and "in 1968, they, as rank and file members, simply did not want to voluntarily chance a loss of seniority by any dovetailing of rosters, and they ought not to be allowed back pay now for something they opposed then." (A-63)

Despite that finding, the Court of Appeals spent a good portion of its opinion arguing with the District Court's findings of fact and remanded as against the Unions to determine whether they combined with N & W to deprive black employees of income opportunities. (A-95)

C. Statistical Facts.

Plaintiffs rely on statistical evidence to bolster their argument as to furloughs and loss of work. However, plaintiffs, by their own testimony, have stated that their seniority in the Barney Yard is good assurance against being furloughed. Robert Rock, a plaintiff in this suit, who has been employed in the Barney Yard since 1947, stated that he could not recall ever

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being unable to work at all in the course of a week (A-I, 98a). Barney Yard employee, George Hines, stated that he had not been furloughed since 1964 (A-1, 200a). Further, M. P. Hanyes, a Barney Yard employee, testified that he had worked regularly, and that when he did work he often worked a total of 16 hours in a 24-hour period (A-I, 232a; A-I, 248a).

The evidence set forth in the case has shown that the availability of coal is beyond the control of all defendants. The resulting lack of work from the aforementioned shortage of coal affects all Barney Yard employees equally, both black and white, whether they are brakemen, conductors or car retarder operators (A-I, 547 a through 551a). The CT Yard furlough system is the same as the system used in the Barney Yard (A-I, 466a, 467a, 502a, 503a). In other words, if the availability of coal is up, and the availability of other cargo is down, there is a resulting lack of work in the CT Yard (A-I,548a through 562a). As a result, it appears that coal shortages in the past have contributed to the plaintiffs' statistical averages, despite the fact that plaintiffs relate all differences to a racially motivated discriminatory furlough system.

The District Court found that during the pertinent period there were approximately 145 Barney Yard men and approximately 350 CT Yard employees (A-I, 33a). The Court further found that such figures "provided the Railroad with a black and white work force in about equal percentage to the surrounding population . . . " and that the percentage would meet the requirements of the Civil Rights Act, but for

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the segregation into two yards (A-12).

D. Merger of Conductors' Roster.

The progression of the job titles in the Barney Yard and the CT Yard is exactly the same: brakeman is the entry-level job, conductor is the second-level job, and car retarder operator is the highest-level job. Each position in the Barney Yard has the same pay as the corresponding position in the CT Yard (A-I, 28a; A-I, 500a through 538a).

The N & W normally attempts to hold promotions to conductor to those employees who have five years experience or more, as dictated by the demand for conductors (A-I, 459a). The primary reason for the desire to have a man with five years experience prior to his promotion to conductor is that on-the-job training is of great importance (A-I, 460a). The N & W determines the need for conductors and all brakemen are eligible for promotion to conductor, provided they have experience and pass the conductors' exam administered by the Company (A-I, 459a). Every man on the conductors' roster has passed the conductors' exam. A brakeman's seniority on the conductors' roster is determined by the date that he passed the exam. The conductors' exam is prepared, administered and graded by the N & W, without interference by the Union (A-I, 459a). A brakeman's seniority on the brakemen's roster is determined by the date that he is hired at this entry-level job. Conductors' and car retarder operators' seniority dates are based on the day of promotion to conductor or car retarder operator,

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as the case may be.

For a history of the status of Barney Yard and CT Yard conductors' rosters, we refer to A-I, 53a, wherein the United States v. C & O decree was mistakenly inserted in the first appendix on appeal, and also page A-I, 69a (A-22), which is the decree in the Rock case as entered by Judge MacKenzie on April 28, 1972. In both instances, the decree provided, with respect to merging the rosters, that Barney Yard brakemen could be promoted to Yard Conductor after they had worked at least two years in the Barney Yard, had at least 80 hours on-the-job training in the CT Yard, and had passed the yard conductors' exam. They further provided that Barney Yard brakemen promoted to Yard Conductors should establish a seniority date on the yard conductors' roster on the date that they passed the yard conductors' exam. Both decrees state:

> "If two or more Barney Yard brakemen or Yard brakemen pass the yard conductors' test on the same day, they shall establish seniority on the yard conductors' roster in the order of their company seniority date." (Emphasis supplied).

The foregoing provision, used in both decrees, was a tie-breaker provision, and was the first usage of date of hire as a determining factor in establishing seniority dates on the conductors' roster.

The plaintiffs proposed that the brake-

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men's roster be dovetailed on the basis of date of hire, that the conductors' roster be merged on the date of hire, and that the car retarder operators' roster be merged on the date of promotion to car retarder operator. After the remand trial, the defendant Union proposed that the merger of the conductors' rosters provide that:

> "Any conductor who is not qualified in a particular yard shall be permitted to qualify within 180 days. Upon qualifying, the roster shall so indicate. A conductor who fails to qualify within a period of 180 days, but who later qualifies, shall acquire conductors' seniority in the yard in which he is not qualified as of the date that he qualifies; provided, however, that nothing in this decree shall require an employee to qualify for a conductor's position."

By this proposal, a conductor is allowed to qualify in both yards, thus preserving his rights to available jobs on either yard, but no conductor is threatened with the loss of his seniority date by comparing his hiring date with another conductor's hiring date.

However, the Fourth Circuit Court of Appeals, on the second appeal, remanded the case for dovetailing of conductors' rosters on the basis of date of hire. This was done in spite of the earlier directive of a different panel of the Court of Appeals not to give Barney Yard brakemen "any higher or broader rights than those enjoyed or granted to CT Yard brakemen

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who had qualified for promotion to conductors." 473 F. 2d at 1349 (A-52).

E. Nickel Plate Merger.

The plaintiffs raised the facts of the Nickel Plate Merger for the first time at the remand trial. There is no copy of the Nickel Plate Merger introduced in evidence, and there is no evidence on the subject other than the testimony of Mr. Malloy, who is a vice president in labor relations with the N & W. Mr. Malloy's job is to pay wage claims under the protective plan known as the Nickel Plate Merger Agreement, wherein yard men submit a claim form showing their protected wage level and their actual earnings for a period of a month and assert that they were available for more work had it been available. The amount consequently due the worker (the difference between a guaranteed wage and his actual earnings) is paid by the N & W pursuant to the Nickel Plate Merger Agreement.

Barney Yard employees are protected under the Nickel Plate Merger Agreement, and their wages are guaranteed in the same manner as the CT Yard men.

The District Court would not consider this agreement because of its lateness and the circumstances under which it was brought to the Court's attention. The Court of Appeals, however, directed the District Court on remand to consider the Nickel Plate Agreement unless it concludes that the tardiness of this issue prejudices the defendants.

REASONS FOR GRANTING WRIT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING BACK PAY TO THE PLAINTIFF CLASS.

A. THE DISTRICT COURT DID NOT FIND THE N & W SENIORITY SYSTEM UNLAWFUL.

In order to advance their position in favor of back pay, the plaintiffs argue that the Court's finding that there was nepotistic hiring by the N & W should be expanded to read that the seniority system and the operation of separate yards were likewise discriminatory. However, the District Court has not so found, and it is submitted that the Court of Appeals, in remanding this case the first time, did so for the purpose of dovetailing the rosters, and a reconsideration of back pay, and that Court did not order the Trial Court make a finding of discrimination in the seniority system and thereby award back pay.

The District Court has the authority under 42 U. S. C. A. §2000e-5(b) to shape affirmative relief in civil rights cases "with or without back pay." The plaintiffs relied on Moody v. Albemarle Paper Company, 474 F. 2d 134 (4th Cir. 1973) (prior to this Court's reconsideration of Moody) for their proposition that "the exercise of discretion must serve the remedial purposes of Title VII and conform to standards announced by the appellate courts, including this Court." In Moody, the Court found a discriminatory seniority system, a finding that is absent in the instant case through two trials at the District

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Court level and two appeals to the Court of Appeals. Here, the District Court has found that the N & W was guilty of nepotistic hiring, and that no individual employee has proved that he was discriminated against on a personal basis insofar as hiring or seniority is concerned. The Court of Appeals did not overrule the Trial Court finding that the nepotistic hiring by the N & W was a violation, and said in 473 F. 2d 1348: "The findings by the District Court that, in its hiring practices, the defendants had violated the Act. . . is not clearly erroneous and is accordingly affirmed."

The plaintiffs also rely heavily on Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir. 1971) in their contention that back pay is required once the Court has found a violation of the Act. It is submitted that the Court of Appeals considered Robinson v. Lorillard in remanding this case after the first appeal, since that case was cited in the opinion, and despite that consideration, did not order the District Court to award back pay. The Court of Appeals merely stated that the District Court "should make specific findings on the conflicting claims of the parties on this issue."

The plaintiffs would lay down a hard and fast rule with regard to the allowance of back pay. The District Court has, in its discretion, chosen not to follow a rigid rule. This Court has defined discretion as :

> "The term 'discretion' denotes the absence of a hard and fast rule . . . . When invoked as a guide to judicial action it means

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> a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of a judge to a just result." Langnes v. Green, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 520 (1931).

See also LeBlanc v. Southern Bell Tel. & Tel., 460 F. 2d 1228, 1229 (5th Cir. 1972) and Banks v. Seaboard, 360 F. Supp. 1372, where no back pay was awarded absent evidence that the seniority system apprenticeship or training requirement for car inspector examination were racially motivated. Furthermore, Robinson v. Lorillard is different in its facts from the instant case since it involved black jobs that were consistently lower paying and less desirable than those jobs awarded to whites.

The District Court's decree held that:

> "The yards have not been ordered merged. Progression may be slower in one yard than another, but this is the nature of the work of the yard, not the racial characteristics of those laboring therein." (A-63).

Thus, the District Court has not found racial discrimination in job classification, but in nepotistic hiring, and this is a special circumstance that is within the province of the Court to recognize.

Another special circumstance to justify no imposition of back pay is that the plaintiffs, despite a barrage of statistical data, are unable to prove that the disparities in wages that they decry are not as much a factor of economics as opposed to deliberate racial discrimination. Evidence has been introduced in a likewise voluminous manner that decreases in coal availability have in the past decreased the employment opportunities in the Barney Yard, and that on the other occasions the Barney Yard has had greater work opportunities than the CT Yard (A-I, 548a through 562a).

The District Court also accepted as proved that the N & W made a bona fide proposal in 1968 to merge the rosters, and the Court found that this proposal was communicated to the Unions and turned down (A-II, 24) (A-63). A letter from J. T. Jennings, Secretary-Treasurer of Local 550, which was introduced into evidence, stated that the Lodge had voted to table discussion of merger of seniority rosters pending merger of the seniority rosters between Norfolk and Western and the Virginian employees. The letter further went on to state that Local 974 "requests that the men on the Barney Yard be included in any and all merging of seniority rosters on the Norfolk Terminal" (A-I, 924a). The BRT (now UTU) did attempt to assist the Barney Yard officers in their quest for a merger of seniority rosters, but the Barney Yard officers stated that they were not able to make any acceptance on their own, and would have to take the matter back to the membership for further advice (A-I, 686a, 695a-698a).

At a conference held October 2, 1967 to discuss items in a certain request letter (N & W Exhibits 18 and 19, First Trial, A-I, 933a, 940a), which was attended by UTU General Chairman M. Y. Lusk, M. E. Peanort, Secretary-Treasurer of Local 974, and Robert Rock, the Local Chairman of 974, Lusk stated that the letter was not a request that any rosters be merged at that time, but only a request that the Barney Yard be included in any such merger if the rosters of former Virginian trainmen and N & W trainmen at the Norfolk Terminal were ever merged. M. E. Peanort, in writing Robert Rock, a plaintiff in this action, concurred with Mr. Lusk's statement (N & W Exhibit 18, First Trial, A-I, 933a).

Such a concurrence by Rock and Peanort was again evidenced at a meeting on October 19, 1967 (N & W Exhibit 19, First Trial, A-I, 940a).

These statements were made to the N & W by Mr. Lusk, representing the UTU and as lawful bargaining agent for Local 974, and the concurrence in the statement that the request for merger was not official by officers of Local 974 is evidence that the plaintiffs cannot rise above in this case. From October 17, 1967 until the filing of this law suit on June 2, 1969, no further request was made to merge the seniority rosters by Local 974 (A-I, 577a, 628a), despite the fact that there were conferences concerning seniority roster mergers which involved Mr. Rock, Mr. Peanort and Mr. Haynes, members and officers of Local 974, which conferences were held as late as November and December 1968 (A-I, 757a through 767a; Tr. 886-894).

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In 1968, the same year that plaintiffs claim they had no knowledge of an offer by N & W to merge the rosters, a referendum was conducted by officials of Local 974 to determine the feeling of its members as to merging the seniority rosters. Of 128 ballots mailed to members, the following results were returned: 21 for dovetailing, 12 for topping and bottoming, 7 against any form of merger. Eighty-eight did not bother to reply (A-I, 241a through 243a).

The foregoing matters were available to the District Court in determining that there were special circumstances that would justify the Court in refusing back pay to the plaintiff class. Nepotistic hiring is not the type of conduct that would create disparity in wages. Even if the Barney Yard was comprised of a perfect ratio of white to black, as opposed to the population of the Tidewater area, and the economic factors that have influenced the Norfolk and Western Terminal in Norfolk were present as they have been in the past, any resulting disparity in wages earned by Barney Yard workers as opposed to CT Yard workers would not be an indicia of racial discrimination, but a product of economics.

It is submitted that the statistical evidence relied upon by plaintiffs does not take into consideration the amount of work available versus the amount of people available to do the work. As noted earlier, the Barney Yard was comprised of about 145 workers as opposed to 350 in the CT Yard (A-I, 33a). If the N & W had truly discriminated in holding down black hirings, the Barney Yard would have had a smaller total work force. The smaller work force, while representing a lower percentage of blacks than

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found in the community, would have more work available to it during times of slack, and there would be fewer furloughs. The Barney Yardmen would then make a higher per man income, and statistics would so reflect. Thus, as another speculative nature of the statistics involved, it appears that no consideration has been given to the fact that there may be too many Barney Yard employees for the work that is available, yet the plaintiffs complain vehemently that the average Barney Yard income is less than the average CT Yard income. Mr. Timothy Malloy, Vice President, Labor Relations, for the N & W, testified in the remand trial regarding payments made under the Nickel Plate Merger Agreement, and on cross examination by the plaintiffs' counsel, he described his impression of the differences between Barney Yard and CT Yard earnings and the factors that control differences in earnings:

> "Work habits, availability of work. Some men are more aggressive when they are young, and do not have responsibilities at home as they do when they get older, their responsibility lessens, and they work less." (A-II, 244).

The foregoing is the testimony of a man who works in labor relations, and who specializes in computing employees' earnings on the N & W. A review of the N & W brakeman rosters for the Barney Yard and CT Yard in 1971 (A-I, 832a, 836a) shows that, while the average Barney Yard date of seniority is 1958, and the average CT Yard date of seniority is 1960, the median for the

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Barney Yard is 1957 and the median for the CT Yard is 1962. The Barney Yard, then, is comprised of a generally older work force, and when taken with the testimony above, it appears that the plaintiffs' statistics do not reveal the entire picture, and the speculative nature of plaintiffs' statistics is evident.

Under cross examination, the plaintiffs' statistical witness admitted that there were numerous examples of Barney Yard men out-earning CT Yard men (A-II, 290-297). N & W's Exhibits 2 and 3 (A-II, 441-455) show that there are numerous examples of Barney Yard men out-earning CT Yard men of equal or greater seniority. Plaintiffs' counsel stated that: "We don't doubt that these are accurate summaries of what they purport to summarize, and as summaries of some of the information contained in our exhibits we don't contest that they are accurate" (A-II, 305).

B. THE DEFENDANT UNION IS NOT LIABLE FOR BACK PAY.

Even if there is an award of back pay, the record will not support a finding that the Union defendants are responsible for the payment of any part of the back pay award. The District Court found at the conclusion of the first trial of this case that:

> "Yard conductors, assistant trainmasters, and trainmasters are recruited by Norfolk and Western from the CT Yard force. Barney Yard brakemen, conceding that this training and work experience

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> does not presently qualify them for such promotions, are therefore effectively blocked in their efforts to move ahead. To this extent they are 'locked in' to the three grades of brakeman, foreman and car retarder operator." (A-20).

After the remand hearing, the District Court found, in its Opinion and Order dated May 17, 1974, that:

> "Our reference in the prior opinion to employees of the Barney Yard being 'locked in' to a degree, only spoke of promotion to assistant yardmaster and yardmaster. The reference there had nothing to do with progression within the three grades of the yards themselves. Since our view of the evidence indicates only three yardmasters in twenty-five (25) years, this could hardly be urged to award back pay." (A-64).

Thus, the District Court's only finding of fact as to discrimination by the N & W was that the N & W was guilty of nepotistic hiring (A-19). That finding was affirmed by the Court of Appeals in its opinion, which stated:

> "The findings by the District Court that, in its hiring practices the defendants had violated the Act . . . is not clearly erroneous and is accordingly affirmed." 473 F. 2d 1344 (A-47,48).

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On the other hand, the District Court found that the Union was guilty of discrimination in violation of Title VII of the Civil Rights Act of 1964 by maintaining separate UTU locals, and the District Court ordered a plan for the merger of the two locals. That plan was adopted immediately after the District Court's first decree, and the two locals have long been merged into Local 48, and now function according to the Court's decree (A-19).

The outcome of this case is similar to U.S. v. Jacksonville Terminal Company, 451 F. 2d 418 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972), wherein the Court found that failure to consolidate locals violated the Act, and the proper remedy was for a reasonable consolidation procedure which would provide for the equitable representation of all Union members. There, as in the instant case, the order as to the Union was only for the merger of the separate locals, and there was no order for back pay.

It should be noted that running through the entire proceedings of this case, including the District Court's original order, the Fourth Circuit's decree, the District Court's order on remand, and the Court of Appeals' second opinion, the Union has never been found to be guilty of any discrimination or discriminatory employment employment practices except for the maintenance of separate locals. The District Court, in its remand opinion, made no findings as against the Union, thereby not disturbing the earlier findings of the District Court and the Fourth Circuit as to the Union's culpability in this case.

The maintenance of separate locals had nothing to do with a man's hiring, promotional opportunities, furloughs, overtime work, etc., nor does it have anything to do with the existing seniority system. The evidence disclosed that the place where a man was hired (Barney Yard or CT Yard) determined the lodge to which he belonged, but the converse did not apply, and the individual's race or color was not a factor (A-I, 296a). The most convincing proof that the separate UTU locals bear no relation to hiring, promotional and furlough discrimination that the plaintiffs allege is found in the fact that the locals have been merged for two years. Local 48, the new merged local, has been operating since the District Court's first order. Despite that fact, the plaintiffs argue, up to the present, that they are still being discriminated against in their employment. If they are, the blame cannot be laid upon the Union's maintenance of racially separate locals.

C. THE FOURTH CIRCUIT COURT OF APPEALS HAS AGAIN IGNORED THIS COURT'S DIRECTIVE IN ALBEMARLE V. MOODY.

In Albemarle Paper Company v. Moody, et al, 95 S. Ct. 2362 (1975), this Court said in at least three separate parts of its opinion that District Court findings of fact should be given the deference to which they are entitled under Rule 52(a) of the Federal Rules of Civil Procedure.

More specifically, this Court stated at page 2373 that:

"The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases."

This case has proceded on for in excess of six years, and the District Judge has heard literally days of testimony, has reviewed hundreds of documents, seniority rosters, and other memoranda, and has listened to hours of oral argument and explanation, and it is submitted that the Court of Appeals, in its most recent opinion, has chosen to ignore the District Court's findings of fact and a majority of the panel has spent great time and trouble arguing with the findings of the District Court so that the end result of their opinion can be justified by the facts.

This is the essence of the reason for the rule giving great weight to the chancellor's findings of fact, and it is a dangerous practice to allow a court of appeals to arrive at its own unfettered conclusions to justify the ends it seeks.

Judge Widener grasped the problem brought before this Court in his dissent when he stated:

"So the crediting by the majority

> of testimony of representatives of the affected class that they had neither seen nor heard of the offer and its casting aside the perfectly well supported findings of fact by the district judge is quite beyond comprehension." (A-113)

In summary, the Court of Appeals' absolute failure to follow the rules required by Albemarle v. Moody with regard to the District Court's findings of fact, and the resulting strong and conflicting dissent, require a thorough review of this case to meet the ends of justice.

II. THE COURT OF APPEALS' DECISION TO DOVETAIL CONDUCTORS' SENIORITY BY DATE OF HIRE IS IN CONFLICT WITH PREVIOUS DECISIONS AND WITH OTHER CIRCUITS, WHERE THE GENERAL RULE IS THAT THE REMEDY TO CORRECT PAST DISCRIMINATION MUST NOT BE EQUALLY DISCRIMINATORY.

Historically, at the N & W Norfolk Terminal, there have been two conductors' rosters, one in the Barney Yard and one in the CT Yard, and they are made up on the basis of promotion date to the job of conductor. The District Court's Order on Remand merged the brakemen's rosters on the basis of date of hire, since that is the basis of the make-up of the brakemen's roster, merged the conductors' roster on the basis of date of promotion to conductor, since that is the basis for the make-up of the conductors' roster, and merged the car retarder operators' roster on the basis of date of promotion to car retarder operator, since that is the basis of the make-up for that roster.

Plaintiffs proposed that, despite the fact the conductors' roster is made up on the basis of promotion date, the conductors' roster be merged on the basis of date of hire. The plaintiffs stated that because of alleged greater promotional opportunities in the CT Yard, the existing conductors' rosters bear the marks of past discrimination, and that a dovetailing of the conductors' rosters based on conductor promotion date would carry forth the effects of past discrimination.

Judge Russell stated in the Court of Appeals' first decree:

> ". . . where discrimination violations of the Act have been found, the remedy granted must eliminate all residual effects of past discrimination to the greatest extent practical." (A-50).

The Court of Appeals disregarded the "greatest extent practical" and merged the conductors' roster in a manner different from which the rosters are made up. This method fails to realize that incumbent conductors from both yards have earned the status of conductor, and have been awarded with a seniority date as of the date of promotion as opposed to the automatic terminal-wide seniority given to brakemen by merely being hired. It is also interesting to note that plaintiffs and the Court of Appeals do not object to the car retarder operators' rosters being merged on the basis of date of promotion, since there are three times as many car retarder operators in the Barney Yard as there are in the CT Yard, the car retarder operator job being the highest paying and best job insofar as working conditions are concerned (A-I, 495a, 496a).

The order to merge the conductors' rosters on the basis of terminal seniority date runs squarely into the proposition that no one is entitled to super seniority under the Act. U.S. v. C & O, 471 F. 2d 582 (4th Cir. 1972); U.S. v. Bethlehem Steel Corp., 446 F. 2d 652 (2nd Cir. 1971); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

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Furthermore, conductors, whether Barney Yard or CT Yard, will lose their rightful seniority as the result of the plaintiffs' proposal, and they should "not suffer displacement, lay-off or furlough merely to satisfy some court-imposed quota or black/white ratio." U.S. v. Jacksonville Terminal, 451 F. 2d 418 (5th Cir. 1971).

It is submitted that this Court should review this case because the Fourth Circuit Court of Appeals has contradicted itself, when the present case is compared to the C & O case. In the C & O decision, the Court of Appeals stated that the government's plan to avoid super seniority (i.e., that all brakemen on the conductors' roster, regardless of race, be ranked by the company seniority) was "unnecessarily sweeping, for if all brakemen are ranked by company seniority on the conductors' roster, certain general yard brakemen may be displaced by other general yard brakemen with more company but less conductor seniority." 471 F. 2d 582, at 590. This "unnecessarily sweeping" plan is precisely what the Court of Appeals has ordered in the instant case.

In the C & O case, the Court of Appeals stated:

> "Accordingly, on remand the District Court should modify its decree to provide that as between a Barney Yard brakeman and a General Yard brakeman or between two Barney Yard brakemen competing for a

> conductor's job, company seniority shall determine rank . . ." 471 F. 2d 582, at 590.

It is submitted that the District Court understood this language, and it recognized the sharp distinction between the language above and the proposal set forth by the plaintiffs as to the merger of conductor seniority rosters. Following the instructions in C & O, the District Court, in the instant case (A-11, 40), ordered that: "If two or more brakemen pass the conductors' test on the same day, they shall establish seniority on the conductors' roster in the order of their terminal seniority dates." The District Court's first decree in this case provided the same (A-26). Thus, the date of hire is used as a tiebreaker when a Barney Yard man and a CT Yard man compete, but it does not affect all conductors in both yards.

The District Court, in its remand opinion, stated that it had considered the C & O case in reaching its decision (A-60), and the District Court relied on Judge Russell's order that a merger of the rosters "would necessarily provide for the preservation of the rights of all incumbent employees at both yards and would permit no displacement of incumbent employees," and the Court relied on Judge Russell's further ruling on this very specific point that:

> "With particular reference to the right of Barney Yard brakemen to qualify for a promotion to conductor, any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this

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higher classification, not give such brakemen higher or broader rights than those enjoyed or granted to CT Yard brakemen, who had qualified for promotion to conductor." 473 F. 2d 1349 (A-52).

Defendant Union submits that by the above statement Judge Russell predicted a problem with the loss of incumbent positions from the merger of the rosters, and specifically instructed the Court to avoid the super seniority problem or the displacement of incumbent employees. Despite that statement, the Court of Appeals, with a different panel, has now chosen to order displacement of incumbent employees. This is where the United States Supreme Court must lend its helping hand to those members of the innocent class of employees who will lose their contracted-for and hard-earned seniority standings on the conductors' roster because of a court-imposed quota.

The Fourth Circuit has had occasion to review another related case recently, styled Williams, et al v. Norfolk and Western Railway, No. 74-1549, _____ F. 2d _____, and Judge Widener mentioned the case in his dissent of the instant case. In Williams, Judge Fields' dissent noted: "One of the problems confronting the court in that case is the hypersensitive question of seniority . . .," and hypersensitive it is, as Circuit Judge Coleman so aptly stated in his dissent from the majority in U. S. v. Jacksonville Terminal, supra:

". . . are we going to eliminate that discrimination by destroying

> the seniority of those who for years, under contract, in good faith worked to earn it? That, to me, is substituting one form of discrimination for another."

It is submitted, therefore, that the circuits are in conflict with regard to the issue of union seniority and its sanctity or lack of it. Further, this issue of seniority rights is a Federal question affecting not only the railroad industry, but others, and it is submitted that this Court should assume jurisdiction and decide this important Federal question once and for all.

The question that arises is: Does the Court possess the power, in shaping its remedy to correct wrongful discrimination, to punish innocent parties in order to allow the claimants to step into their "rightful place"? In this case, the sanctity of railroad seniority has been expressed innumerable times throughout the many days of trial. The fashioning of a remedy in the form of merging the conductor seniority rosters on the basis of date of hire with the company, will serve no other purpose than to frustrate the lives, livelihoods and plans of those who have relied upon their seniority rights over the past and presumably, in the future, and who have successfully passed the conductors' examination and stepped up to that grade with assurances that their seniority was protected.

CONCLUSION

For the reasons heretofore stated, this Petition for a Writ of Certiorari should be granted for this Court to review the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

Willard J. Moody

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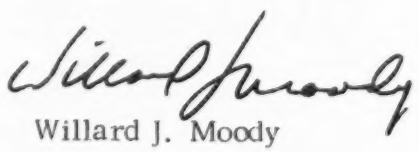
CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of United Transportation Union, Lodge Number 550 and United Transportation Union v. Robert Rock, Ezell B. Johnson, Russell C. Walker, and others, and United Transportation Union, Local Number 974, were deposited in the United States mails, first class, to William T. Mason, Jr., Esquire, 147 Granby Street, Norfolk, Virginia 23510; Jonathan Wallas, Esquire, 951 South Independence Boulevard, Charlotte, North Carolina 28202; Jack Greenburg, Esquire and Morris J. Baller, Esquire, 10 Columbus Circle, New York, New York 10019; James T. Turner, 1700 Virginia National Bank Building, Norfolk, Virginia 23510, counsel of record for respondents on the 9th day of January, 1976. It is further stated that the Petition has been served on all parties.



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ROBERT ROCK, ET AL,

Plaintiffs

v. Civil Action No. 255-69-N

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL,

Defendants

(Judgment Entered January 20, 1972)

MEMORANDUM OPINION

Robert Rock, Ezell Johnson, and Russell C Walker, Norfolk and Western employees, with Local 974, United Transportation Union (formerly designated as Brotherhood of Railroad Trainmen), of which they are members, have instituted this proceeding against the Norfolk and Western Railway Company and Local 550, United Transportation Union. The suit charges violations by the Railroad Company and Local 550 of the equal employment opportunity rights of the plaintiff protected by Title VII of the Civil Rights Act of 1964 [42 U. S. C. A. §2000 (e)].

Broad specifications were originally laid to the defendants. Some of these complaints were abandoned. No evidence was introduced as to others. Suffice it to say that the emerging issues for decisions are twofold: (a) whether the Norfolk and Western, on its part, has violated Section 703 (a) of Title VII [42 U. S. C. A. §2000 (a)] which provides: --

> "It shall be an unlawful employment practice for an employer - . . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,

because of such individual's race . . . ."

(b) Whether Local 550, on its part, has violated Section 703 (c) of Title VII [42 U. S. C. A. §2003-2 (c)], which provides:

> "It shall be an unlawful employment practice for a labor organization - . . . (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race . . . ."

Background

The Norfolk and Western Railroad terminal at Norfolk is in fact two separate yards. The CT Yard is the commercial and classification yard into which is received all incoming Norfolk and Western freight from sea or by rail or truck, of every description, including coal. There is also the Barney Yard facility which is exclusively a terminal for receipt of coal by rail for

export to the world over.

As in the case of railroad industry nationwide, Norfolk and Western employment at Norfolk is down from peak years. The Barney Yard operation has approximately 145 operating employees, nearly all black, divided into a three step employment progression of brakemen, foremen, and car retarder operators. The CT Yard has approximately 350 operating employees, mostly white, in a three step employment system of brakemen, conductors, and car retarder operators.

The pay is identical in each step in each Yard and no problem of disparate wages is presented in this case. A single international union, United Transportation Union, has jurisdiction throughout both Yards. Workers of both Yards are governed by a single collective bargaining agreement negotiated between UTU and N&W.

This court has recently had before it the companion case involving much the same problem, see United States of America v. Chesapeake and Ohio Railway Company, et al., Civil Action No. 1469-NN (decided August 24, 1971, E.D. Va.). There are differences in the two cases, however, in employment practices after July 1, 1965.

Contentions

Plaintiffs maintain that statistics show that the Barney Yard is, for all purposes,

totally black and the CT Yard totally white, and that this, of itself, is evidence of racial discrimination. They deny that any rational reason is offered to rebut the inference which these statistics may establish. In addition, the plaintiffs charge that the Barney Yard and CT Yard are deliberately maintained as separate racially discriminatory work areas. They say also that the two locals are racially segregated purposely. To buttress their position, the plaintiffs maintain that the work in the Barney Yard and CT Yard is essentially the same, though the work in the Barney Yard is more menial and more limited. It is urged that there are inequities in the opportunities in the two Yards; that promotions are slower in the Barney Yard; that advancement to management positions of yardmaster are greater for CT Yard men than for Barney Yard men.

In addition to other relief sought, the plaintiffs also seek merger of the Locals 974 and 550 and a merger of the seniority rosters for the two yards.

It is generally agreed that hiring practices in the two Yards prior to 1965 was on a nepotistic, word-of-mouth, father-to-son basis and that thus a segregated hiring pattern resulted, which perpetuated itself. Blacks continued to be hired in the black Barney Yard operation and whites continued to be hired in the white CT Yard. This type of recruitment, says the plaintiffs, has operated to exclude blacks from an equal opportunity to secure what they claim to be better, less menial CT Yard work. Since 1965, the plaintiffs maintain the

same general employment practice has been in vogue to the end that the racial segregation in the two yards, apparent before 1965, is still fostered and preserved.

Norfolk and Western, on its part, points out that the jobs in the two yards pay exactly the same and that one yard is not "higher paying" than the other. The Railroad disputes that employment in one yard to be any better or more menial that the other.

Specifidally, the Railroad Company denies that there has been any purposely racially segregated work groups or work areas or that any separate seniority rosters have been maintained solely on the basis of race looking towards the continuance of segregated work groups or areas.

As a main point in its defense, the Norfolk and Western points out that it is agreeable, and has been for several years, to the merger of the seniority rosters of the two yards and has been so publicly recorded. The separate operation of the Barney Yard and the CT Yard, says the Railroad, is strictly a matter of proper business consideration, looking to a sound, safe operation. The two yards are unlike in the scope of the duties of their respective workers and are, in short, absolutely different functions which only coincide in the very limited physical job of setting and releasing hand brakes.

The Railroad maintains that its statutory obligations under the Federal Employees' Liability Act has forced the maintenance of separate facilities because of the all-pervasive requirement of the Railroad to operate safely. This policy is no where dictated on racial considerations. Norfolk and Western denies that the handling of coal in the Barney Yard is any dirtier or any more menial than the handling of the same coal as it moves through the CT Yard; it denies that furloughs are more numerous in the Barney Yard than in the CT Yard since the job situation is entirely dependent upon the availability and presence of ships at the railroad's coal piers for loading. If there are no ships, there is a lack of work but this lack, says the Railroad, surfaces both in the Barney Yard and in the CT Yard where the trains of coal first arrive and are handled for shifting by railroad locomotives before being turned over to the hump operation in the Barney Yard.

The Railroad agrees that there is no transfer of seniority between the Barney Yard and the CT Yard but relies on what it claims are good valid business reasons, totally unrelated to race for the maintenance of the separate yards and the maintenance of separate seniority districts based upon the collective bargaining agreements concluded by the Barney Yard employees and the CT Yard employees by the designated union.

The Railroad flatly denies the allegation that Negro employees have less opportunity for advancement to higher paying jobs. They point out that even preceding the enactment of Title VII there was a three step line of progression in both

yards. Each position in each yard has the same pay as the corresponding position in the other yard and this equal rate of pay existed for many years preceding the enactment of Title VII.

The Railroad points out that there has been no evidence offered to support the claim of a racially discriminatory apprentice program or that there were any toilets or locker rooms maintained on a racially segregated basis, or that there has been any failure on the part of the Railroad to take adequate affirmative steps to correct any discriminatory effects of any prior or present racially-discriminatory practice. The Railroad specifically relies upon the absence of any request on the part of the plaintiffs in this case, or locals involved, to merge seniority rosters and emphasizes instead its own offer made in 1968 to merge the seniority rosters, which offer has not yet been accepted by either Yard.

Local 550, on its part, answers that the plaintiffs themselves, by their own testimony, indicate that the hiring of Negroes in the Barney Yard was through their own efforts and independent of any acts of the United Transportation Union or Local 550. Neither the United Transportation Union nor Local 550 have any authority over hiring practices of Norfolk and Western or have anything to do with its personnel problems and policies. The hiring of blacks in the Barney Yard is a purely historical development, perpetuated and encouraged by the plaintiffs themselves. Even the policy of hiring blacks in the Barney Yard has been abandoned and that

since the advent of the United Transportation Union as a bargaining agent for Local 974 in 1960, that there is no policy in hiring primarily blacks in the Barney Yard or whites in the CT Yard. The union agrees that until 1960 there was a "white clause" in the Brotherhood of Railroad Trainmen Constitution but that had been removed five years before Title VII became effective. They argue that separate locals have been maintained, at the behest of the members thereof because of certain advantages, i.e., each could have its own officers and each could have its own representative to the National Convention and control over its own grievance procedures. It is pointed out that the UTU has no policy prohibiting the merger of lodges and in fact, it has encouraged merger to eliminate expense. The membership in the specific Lodge, either 550 or 974, says that the union is dictated by where the man works and not by what his race is. The union denies that there is any effort to discriminate on the basis of race and shows that the "annulment rule" to which the Barney Yard workmen have voiced some disapproval operates the same in the Barney Yard as in the CT Yard.

The union joins the Railroad in showing that the jobs performed in the two Yards are quite different, that it is on this basic work difference that the two yards are maintained and not upon any choice of the union, which choice it disclaims it has, to maintain segretated locals. It accepts for membership, say the Locals, those persons employed in the Yard whose place of employment is the criteria to establish lodge membership. No Local negotiates any labor contract and is never a bargaining agent.

Bargaining is done by the United Transportation Union at a much higher level on a system wide and national basis.

The union advances an administrative decision on the question of separate seniority roster which was addressed to the National Railway Adjustment Board. Local 550 car retarder operators (CT Yard employees) had petitioner to extend their seniority into the Barney Yard. Such request was denied by the National Railway Adjustment Board, holding that the seniority rights of the separate Yards could not be infringed upon.

FINDINGS OF FACT

(1) Defendant, Norfolk and Western Railway Company (hereinafter referred to as N & W), is an interstate railroad operation with its Atlantic seaboard terminus at Norfolk, Virginia.

Its facility at Norfolk is, in fact, two adjacent terminals, (a) a general classification yard, known as the CT Yard, through which passes all freight of every category, coal included, and (b) a special yard known as the Barney Yard, which rehandles from the CT Yard coal only for export by sea.

(2) Plaintiffs, Rock, Johnson and Walker, are Negro employees of N & W, working in the Barney Yard at Norfolk.

(3) Plaintiff, Local 974, is a branch

at Norfolk of the United Transportation Union (formerly known as Brotherhood of Railroad Trainmen) to which N & W employees in the Barney Yard belong and includes in its membership, Rock, Johnson and Walker, sho are also plaintiffs.

(4) Defendant, Local 550, is a branch at Norfolk of the United Transportation Union to which N & W employees in the CT Yard belong.

(5) This complaint is filed under Title VII of the Civil Rights Act of 1964 [42 U. S. C. A. §2000 (e)]. The court has jurisdiction.

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(6) Hiring on the N & W, not only at Norfolk, but throughout the entire system is decentralized and is the responsibility of the affected department.

After employment in either the CT Yard or Barney Yard at Norfolk, the employee becomes a member of the United Transportation Union in Locals established along craft lines pursuant to appropriate sections of the Railway Labor Act (45 U. S. C. A. §152), enacted in 1926. A Barney Yard employee belongs to Local 974, a CT Yard employee belongs to Local 550.

(7) In line with the general decline in railroad employment in the years prior to the advent of the Civil Rights Act of 1964, new employment in both the CT Yard and Barney Yard,

had been relatively non-existent.

The few jobs that opened up were quickly filled without any active recruitment. Any Barney Yard job opening would be first known to the predominately black work force, which would provide black applicants, often relatives, immediately. The pay was good, the work relatively stable, and generally, railroad employment was prestigious in the community.

The same hiring conditions also pertained in the CT Yard, where a predominately white work force provided white job seekers, again mostly family relatives, for scarce job openings.

Such a nepotistic hiring provided two things. For the Railway, it supplied employees particularly interested in railroad work, employees grounded in railroading through long family connections with the industry. Such attributes were likely to provide, and did, a loyal, interested work force. For the Negroes, it provided a steady, prestigious job of equal pay to their white counterpart.

As a somewhat vicarious result, it also provided the Railroad with a black and white work force in about equal percentage to the surrounding population - a result which, in most respects, might suit the general purport of the Civil Rights Act of 1964, except in one particular, that work force as to these "brakemen" was largely segregated into blacks in the Barney Yard and whites in the CT Yard.

The plaintiff charges the defendant Railway with violation of Title VII in that: (1) employment in both the CT Yard and Barney Yard is still racially identifiable, and (2) necessary measures have not been taken to correct the pre-1965 discrimination and its perpetuation.

While the mere existence now of racially identifiable groups employed in the two Yards, as a result of pre-1965 hiring practices, does not constitute a violation of Title VII, the continued use of a hiring and job assignment procedure after 1965 which would tend to perpetuate the pre-1965 discrimination and its effects is violative of Title VII. Lea v. Cone Mills Corp., 301 F. Supp. 97 (M. D. N. C. 1969), aff'd. 438 F. 2d 86 (4th Cir. 1970); Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421 (8th Cir. 1970); U. S. v. Sheet Metal Workers Int. Assoc. etc., 416 F. 2d 123 (8th Cir. 1969)

Looking at the substantive evidence relating to post-1965 hiring by defendant Railway, it becomes evident that there exist certain practices in hiring which tend to continue, in new hires, the racial identity of the two Yards.

The testimony of Charles A. Glass, hiring officer for defendant at the Norfolk Terminal, in charge of hiring CT Yard brakemen, testified that it is still the practice of the Railway to obtain new brakemen through recommendation and word-of-mouth communication by presently employed N & W brakemen. Mr. Glass

testified that over half of his hiring is still done in this manner. He said further that only once in this twenty-two month tenure with the defendant had there been any advertisement of job availability by the Railway in newspapers in nearby areas. The extent of the "active recruitment" of blacks for the CT Yard was Glass' notification of several presently employed black CT Yardmen that jobs were available to any qualified friends or relatives they might produce. While such efforts were undoubtedly directed toward creating a more favorable racial balance in the CT Yard, they are insufficient to overcome the perpetuation of racial identification by virtue of the continued nepotistic hiring practices utilized by the defendant even up until the present.

We are unimpressed with the N & W's pro forma compliance in its recitation of policy statements, memoranda and directives from Railway executives directing hiring officials to institute equal employment opportunity hiring practices. The evidence is that in spite of these verbal assertions of intent to comply, hiring practices of the defendant are still highly nepotistic and perpetuate racially identifiable Yards. The statistics speak for themselves. Since 1965, 200 whites have been hired to work in the formerly all white CT Yard while only 15 blacks have been hired for CT Yard service during the same period. This we find to be a violation of Title VII, in line with the decisions in Lee, supra, Parham, supra, and Sheet Metal Workers, supra.

The defendant's post-hiring practices

here are to be distinguished from those of the defendant in the recent case before this court, U. S. v. Chesapeake and Ohio Railway Company, et al, supra. In the C & O case, absolutely no hiring took place between passage of Title VII in 1965 and January 1, 1970. After employment was reactivated by C & O in January, 1970, the evidence presented in that case showed every affirmative effort on the part of the defendant, to actively recruit blacks for the formerly all-white yard and whites for the formerly all-black yard. There was no evidence there of any practice in hiring which would continue the former discrimination and racial imbalance. Such is not the situation, we find, in the case at bar.

(8) We further find that to a degree there is discrimination in the barrier erected which now prevents promotion of Barney Yard men to certain higher job categories.

While the three-step promotion progression in each yard is essentially the same, with exactly the same wage scales, Barney Yard men are "locked in" with no access to such jobs as yard conductors which might lead to the positions of assistant yardmaster and yardmaster.

Certain procedures to allow Barney Yard employees to qualify for and to seek such jobs will be suggested later in this Memorandum.

(9) Two separate seniority rosters are maintained for the CT Yard and Barney Yard. The maintenance of such separate rosters have been attacked as a violation of the Civil Rights Act on grounds that the work and craft is essentially the same

and the continuance of such rosters for similar work, can be laid to efforts to foster illegal racial discrimination by the N & W.

As we first determined in United States v. C & O Railway Co., et al, supra, so we find again as a fact in this case, that the work done in the two Yards is not the came, has only small vestiges of similarity and, in fact, is an entirely different trade. As we said in United States v. C & O Rwy., et al, supra, ". . .[t]he only similarity, and there it ends, is that both General Classification Yard (CT Yard) brakemen and Barney Yard brakemen ride cars, and set and release handbrakes. In fact, Barney Yard brakemen were known, until a short time ago, as 'car riders.' Undoubtedly, the move to upgrade the nomenclature and classify such 'car riders' as brakemen' has precipitated some of the difficulty here."

CT Yard brakemen move drafts of cars under the motive power of a locomotive, a power which he ultimately controls through complicated signals. It is a force which moves in both directions into and out of a complex of industrial trackage, sidings, yards, stations, crossing, and the like. He must concern himself with dangers which exist in front, in back, on adjoining tracks, dangers which move in all directions. Signaling by hand by day and with lantern by night are part of his everyday ritual. Rules which he must know are complicated and pertain to crossings and switchings, inter-line transfers, interlockings, demurrage, priorities of movement

of different classes of freight, etc. Braking, as such, is only a small part of his job.

On the other hand, a Barney Yard car rider is concerned only with the slight force of gravity on a single car or only a few cars as they move slowly downhill from the hump. No locomotive power is involved. A minor knowledge of signaling is all that is necessary. Movement is never in but one direction. Few, if any, rules concern him.

The ". . . difference in general function" of the two yards is admitted in the plaintiffs' brief.

(10) The effort of plaintiffs to show that Barney Yard work is dirtier or more menial is simply not borne out by the evidence.

Coal dust is coal dust no matter whether it is blown by the same wind from the coal in a car moving through the CT Yard or down the slope of the hump of the Barney Yard. If anything, on windless days, the speed of movement through the CT Yard would seem to generate more of a coal dust problem than in the Barney Yard.

Heavy pincher bars are necessary to start balky cars in the Barney Yard, but so are they used all over the railroad, in the CT Yard included.

(11) The maintenance, at Norfolk, of two Locals, No. 550 and No. 974, even though we have found that CT Yard and Barney Yard are indeed different crafts, is not justified and is suspect of a Civil Rights Act

violation. A single international union, United Transportation Union, has jurisdiction in both yards. A single collective bargaining agreement and a single contract with the N & W emanates therefrom. Under the circumstances, the maintenance of two Locals based on place of employment is in violation of Section 703 (c) of Title VII, as being a practice which segregates membership on the basis of race. Local 550 is almost entirely white. Local 974 is almost entirely black.

The merger of the two Unions will be ordered. This is entirely in keeping with the merger by the "topping and bottoming" of the two seniority rosters of the separate yards, which will be directed.

(12) We accept as proved without question that N & W has made the bona fide effort to merge the two seniority rosters. We find no evidence to support the plaintiffs' charge that the offer was in any wise tainted. The seniority rights in possession based on date of original hire are rights to be protected and further orders to preserve such present seniority and to merge the rosters will be suggested.

CONCLUSIONS OF LAW

(1) The maintenance of separate UTU Locals 550 and 974 encompassing CT Yard brakemen and Barney Yard brakemen, but one with white membership and one with black membership, is a discrimination in violation of Title VII of the Civil Rights Act of 1964. Such separate membership is not a responsibility of Norfolk and Western Railway, but of the

unions.

Parties will submit a plan within sixty (60) days from the date of this Memorandum providing for the merger of the two Locals with proper provisions to insure black representation for five (5) years in such tender areas as Grievance Committees and National Conventions of the United Transportation Union.

(2) The hiring practice herein condemned by hiring white relatives and friends in the CT Yard and black relatives and friends in the Barney Yard will be largely overcome by the merger of the seniority rosters as hereinafter called for. Employment of the new merged roster will not bear the stamps of separateness. In any event, no hiring on the accused nepotistic pattern is to occur pending the roster merger.

(3) While the work done in the CT Yard and Barney Yard are not the same, nor is one more menial than the other, nevertheless the existence of the two seniority rosters will continue to create friction. The orderly elimination of this abrasive situation is to the best interest of all involved, securing, however, this present seniority to all employees now serving in the two Yards.

Parties therefore will present to this Court within sixty (60) days from the date of this Memorandum a plan to "top and bottom" the existing seniority rosters of the CT Yard and the Barney Yard to become effective April 1, 1972, with new hirings on and after that date to be upon a single roster serving both yards.

It is recognized that greater entry-level skills than are now required may be necessary.

(4) Yard conductors, assistant trainmasters, and trainmasters are recruited by Norfolk & Western from the CT Yard force. Barney Yard brakemen, conceding that this training and work experience does not presently qualify them for such promotions, are thereby effectively blocked in their efforts to move ahead. To this extent they are "locked-in" to the three grades of brakemen, foremen and car retarder operators.

The retention of this barrier when added to the perpetuation of the nepotistic hiring procedure is a discrimination to be eliminated.

Bearing in mind that the qualifications for yard conductor, assistant trainmaster and trainmaster should not be lowered, the parties are directed to present to this court within sixty (60) days from the date of this Memorandum a plan to become effective April 1, 1972, under which enterprising Barney Yard brakemen seeking to upgrade themselves and seeking promotion to yard conductors, assistant trainmasters, and trainmasters, may qualify for selection to those job levels through an appropriate Norfolk and Western administered on-the-job training program.

(5) The discrimination herein found being, for the most part, entry level employment, and the relief granted being pertinent to that point, no back pay wage relief will be granted.

(6) Attorneys' fees appropriate to the partial relief granted will be granted, to be paid one-third (1/3rd) by the Union and two-thirds (2/3rds) by Norfolk and Western Railway Company.

This case is retained upon the docket. The requirements of this Memorandum will be presented in writing within sixty (60) days of the date hereof. The parties shall discuss the subject of attorneys' fees and agree if possible.

Upon receipt of the plan to complement this Memorandum an appropriate further Order will be entered.

John A. MacKenzie
United States District
Judge

Norfolk, Virginia

January 20, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ROBERT ROCK, ET AL,

Plaintiffs

v. Civil Action No. 255-69-N

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL,

Defendants

(Judgment Entered April 28, 1972)

AMENDED DECREE

The final decree in this cause, entered on April 21, 1972, contains certain errors therein, in the inclusion of Paragraph IV (which is not necessary in this case), and in the provision for two (2) delegates in Paragraph VI (5), when it was the intention of the court to provide for only one (1) delegate, and this amended final decree is therefore now entered to omit Paragraph IV of the Decree of April 21, 1972 and to correct Paragraph VI (5) thereof.

Pursuant to the Findings of Fact and Conclusions of Law entered in this case on January 20, 1972, it is hereby ORDERED, ADJUDGED and DECREED for the Railway's operation at Norfolk, Virginia, as follows:

I

A. The "Plan to 'Top and Bottom' Seniority Rosters -- Effective May 1, 1972" as agreed in writing between Norfolk and Western Railway Company and the General Chairman, United Transportation Union-T, dated February 8, 1972, and slightly amended by the Court, copy of which is appended to this decree as Exhibit "A", is approved by the Court as the operative plan to "top and bottom" the existing seniority rosters of the CT Yard and Barney Yard, to become effective May 1, 1972, with new hirings on and after that date to be on a single roster serving both yards.

B. In instances where deemed necessary by it, the Company may require Barney Yard brakemen to qualify in the Yard and Yard brakemen to qualify in the Barney Yard, provided the employee has made such a request. The Company shall pay employees the straight time rate for each breaking-in period, not to exceed two (2) days.

C. 1. The Company shall advise all present Yard brakemen and Barney Yard brakemen, in writing, that they may receive training for the position of Yard conductor and if they qualify, will be promoted to the position in accordance with the terms of this decree. Barney Yard brakemen who desire such a promotion must so indicate to the Company in writing within 180 days of this decree. The Company shall provide each Barney Yard brakeman with an appropriate form for making the selection. The written notice given to each present Barney Yard brakeman shall state: (1) the pay rate of Yard conductor; (2) the standard test qualifications for promotion to Yard conductor; and (3) a summary description of the training to be given. The Company shall encourage present Barney Yard brakemen to qualify for promotion to Yard conductor. Any Barney Yard brakeman or Yard brakeman who elects not to avail himself of special promotion opportunities to Yard conductor provided in this decree shall retain his right to such promotion in accordance with the Yardmen's agreement.

2. The Company shall offer the training program to an employee provided he has worked

as a Yard brakeman or Barney Yard brakeman in Norfolk not less than two years. The Company may limit each training class to ten (10) Barney Yard brakemen to be selected in seniority order.

3. The Company shall pay such Barney Yard brakemen at the brakemen's daily pay rate during the time actually spent in training under the supervision of the Company instructors, but not to exceed 80 straight time hours or 10 days' pay at the straight time rate, unless the collective bargaining agreement provides otherwise. Such Barney Yard brakemen shall remain eligible to take the conductor's examination until he has failed it on three separate occasions. The Company shall offer the examination to present Barney Yard brakemen who make request in writing to take it, but the Company shall not require such employee to take the examination before one year and a half after he has begun training or one year after his last attempt to pass the examination.

4. Present Yard brakemen who are eligible for promotion to Yard conductor may take the conductor's examination at the same time that examination calsses are held for Barney Yard brakemen. Such candidates may, at their convenience and at no expense to the Company, attend special classes which are held for Barney Yard brakemen.

D. 1. Barney Yard brakemen shall be promoted to the Yard conductors roster after all of the following requirements have been satisfied: (1) they have worked for at least two years in the Barney Yard, (2) they have

had at least 80 hours on-the-job training in the Yard, or the Company determines that they are qualified to become Yard conductors without such training, and (3) they have passed the examination for Yard conductors. Barney Yard brakemen promoted to Yard conductor shall establish a seniority date on the Yard conductors roster on the date they pass the Yard conductor's examination. If two or more Barney Yard brakemen or Yard brakemen pass the Yard conductor's test on the same day, they shall establish seniority on the Yard conductor's roster in order of their Company seniority dates.

2. In instances deemed necessary by it, the Company may require brakemen so promoted to qualify for their first service as CT Yard conductors, occurring more than six months after promotion, only when such promoted Conductors have not worked as brakemen in the CT Yard since promotion, in which cases qualification may consist of up to 45 days' service with pay as CT Yard brakemen.

E. Barney Yardmen shall be eligible for selection to the position of assistant yardmaster and yardmaster on the same basis as Yard brakemen.

II

A. 1. Defendant Norfolk and Western shall cease forthwith hiring any yardmen in the Norfolk Terminal by the nepotistic procedures condemned in the Court's Memorandum of January 20, 1972.

2. All hiring for Barney Yard and CT Yard work shall be done through a single office, either at the present Norfolk Terminal Yard Office or in such other conveniently located facility as the Company shall provide, staff and equip for the processing of job applications.

3. In hiring new yardmen for these facilities, the Company shall contact those agencies (including the Virginia State Employment Commission) and media in the Norfolk area which are most likely to produce qualified black applicants as well as qualified white applicants and will be likely to continue racial mix in a proportion comparable to that previously found by the Court to exist. In furtherance of good faith efforts to maintain such a racial mix, the Company may elect to discontinue communication with particular agencies and to substitute other agencies and/or engage in a regular program of advertising in newspapers or other media having general circulation in the black community as well as in the white community in the Norfolk area.

III

A. The Company shall submit to the plaintiff, or to a designee having the approval of the court, the following information and reports, not less frequently than semi-annually except where a different period is specified below.

1. A log showing by name and

date or dates worked all present Barney Yard brakemen who worked in the Yard as brakemen during the preceding six months.

2. A log showing by name, race and date or dates worked all present Yard brakemen who worked in the Barney Yard as brakemen during the preceding six months.

B. A list of all persons presently employed as Barney Yard brakemen who during the next 280 days following the issuance of this decree have indicated to the Company in writing a desire to be trained for the position of Yard conductor. The list shall show the person's name, race (as reported to the Railroad Retirement Board on Form CER-1), the date on which he indicated his interest, the date on which he began training, the date or dates on which he took the conductor's examination, the date on which he passed the examination and the date on which he became a conductor, if applicable. The list shall be updated every six months. The Company shall retain all conductor examinations taken by present Yard brakemen and present Barney Yard brakemen for not more than five (5) years and shall make them available to plaintiff for inspection and copying upon reasonable notice. Each examination, and the corresponding oral examination, shall be clearly scored, marked "pass" or "fail" and signed by the person who scored it.

C. A list of persons by name who were hired as brakemen during the preceding six month period, giving date of hire and race as reported to the Railroad Retirement Board.

D. A list of persons who applied for brakemen jobs during the preceding six months period but were not hired, giving name, race and date of application, together with reasons for rejection or failure to hire.

E. A list of all persons hired or promoted into the positions of assistant yardmaster, yardmaster, assistant trainmaster, and trainmaster during the preceding six months period. Such list shall specify the name, race, and prior position (if any) with N & W of each such person, the date of his promotion, and the job title he was promoted into.

IV

O M I T

V

Every January and July for five (5) years after the date of this Decree the Company shall send the court and plaintiffs copies of its new seniority rosters for Yard brakemen, Yard conductors, Yardmasters, and Barney Yard brakemen, including a racial identification of each individual. When an employee has once been racially identified, no further reporting on this item is necessary.

VI

A. Locals 678 and 1889 of the United Transportation Union (formerly Lodges 550 and 974 of the Brotherhood of Railroad Trainmen) shall be consolidated on or before June 1, 1972. Both Locals shall surrender their charters and jointly apply to the

International for a single new charger. All assets and liabilities of Locals 678 and 1889 shall be transferred to the consolidated Local. The present local committee of the two locals shall become local committees of the consolidated local.

B. The Presidents of Locals 678 and 1889 shall arrange a joint meeting of the Locals to be held no later than thirty (30) days prior to the date of the consolidation of the Locals for the purposes of:

(1) Receiving nomination petitions for officers (not committeemen) of the consolidated Local;

(2) Establishing uniform Local dues;

(3) Adopting Local by-laws which shall include, but not limited to, provisions for time and place of meeting and salaries, if any, to be paid to officers; and

(4) The election of temporary officers. Written notice of such meeting and the purpose therefor must be extended by the Secretary of each defendant Local to the members under his jurisdiction and to the President of the United Transportation Union at least fifteen (15) days prior to such meeting.

C. At the first joint meeting of the Locals the members present shall elect a President, Vice-President and Secretary as temporary officers whose sole purpose is for conducting the election for which this joint meeting is called.

(The officers of the separate locals shall continue in office for purposes of carrying on all business of the respective Local until superseded by the officers duly elected for the merged Local). No more than two of these offices may be held by persons who worked a majority of their time in either the Yard or the Barney Yard. Subsequent meeting of the Locals, if necessary, for the purposes set forth above in Paragraphs VI B (1) through (4) inclusive, will be scheduled as determined by the members present at each joint meeting. The temporary officers elected at the first joint meeting will serve until permanent officers have been elected in accordance with Paragraph VI D below.

D. The first election of officers for the consolidated Local and any election held within five (5) years after the first election shall be conducted in the following manner and in accordance with the applicable laws and regulations of the United Transportation Union.

(1) Officers of the defendant Locals shall cooperate with the temporary officers as necessary in conducting the first election of officers.

(2) The President, Vice-President and Secretary shall be elected by the members of the consolidated Local provided that not more than two of these offices may be held by persons who worked a majority of their time during the year prior to the election in either the Yard or the Barney Yard.

(3) The Chairman and two members of the Board of Trustees shall be elected by the members of the consolidated Local provided

that not more than two of these offices may be held by persons who worked a majority of their time during the year prior to the election in either the Yard or the Barney Yard.

(4) The present Local Committees of Adjustment of the two Locals shall become Local Committees of the consolidated Local. When election for Local Committees of Adjustment are required under the UTU constitution, they shall be conducted in the manner hereinafter provided. Members of the consolidated Local who worked a majority of their time in the Yard during the year prior to the election shall elect a Local Chairman and a Grievance Committee to represent Local members in matters within its jurisdiction which arise from Yard work. Members of the consolidated Local who worked a majority of their time in the Barney Yard during the year prior to the election shall elect a Local Chairman and a Grievance Committee to represent Local members in matters within its jurisdiction which arise from Barney Yard work. Both Grievance Committees shall operate in accordance with the applicable laws and regulations of the United Transportation Union. Each Grievance Committee shall keep a record of all grievances presented to it, which shall include the name of the employee presenting the grievance, the nature of the grievance, the date it was presented, what action was taken on the grievance, and if the Committee did not act on the grievance, the reasons why it did not act. For a period of five (5) years and not more often than every six months, this record shall be submitted to the plaintiffs on request by the plaintiffs.

(5) The Delegate, Alternate Delegate, Legislative Representative and Alternate Legislative Representative, shall be elected by the members of the consolidated Local provided that: if the Delegate is a person who worked the majority of his time in the Yard during the year prior to the election, then the Alternate Delegate shall be a person who worked the majority of his time in the Barney Yard during the year prior to the election, but if the Delegate is a person who worked the majority of his time in the Barney Yard in the year prior to the election, then the Alternate Delegate shall be a person who worked the majority of his time in the Yard during the year prior to the election; and provided further that if the Legislative Representative is a person who worked a majority of his time in the Yard during the year prior to the election then the Alternate Legislative Representative shall be a person who worked the majority of his time in the Barney Yard during the year prior to the election, but if the Legislative Representative is a person who worked a majority of his time in the Barney Yard during the year prior to the election, then the Alternate Legislative Representative shall be a person who worked the majority of his time in the Yard during the year prior to the election.

VII

A. The successor to BRT Locals 678 and 1889 shall each submit a written report to the court, copy to the plaintiffs, on June 1, 1972, which shall set forth:

(1) The numerical designation

of the consolidated local;

(2) The name, address, office title and former local membership of each local officer and committee member.

B. After each subsequent election of officers, committee members and convention delegates, the consolidated local shall submit a written report to the court, copy to the plaintiff or its designee setting forth the name, address, office title and former local membership of each officer, committee member and convention delegate.

C. The reporting obligation of the defendant unions under Sections A and B of this paragraph shall terminate five (5) years after the date of this decree.

VIII

The plaintiff's claim for an award of back pay is in all respects DENIED.

IX

The Company shall publish and post this decree on all employee bulletin boards and shall notify all supervisory personnel at the Norfolk Terminal of the Company's obligation under the decree.

X

Locals 678 and 1889 of UTU (formerly

Lodges 550 and 974 of BRT) and their successors shall in no way interfere with the defendant Norfolk and Western Railway Company in its carrying out its obligations under this decree.

XI

This court shall retain jurisdiction of this cause for five (5) years from the date of ~~this~~ decree for the purpose of enforcing this decree.

XII

Defendants are directed to pay plaintiffs the costs of this action, including the amount of $15,000.00 as reasonable counsel fees. Said award is to be paid in the following proportion: N & W, 66-2/3%, UTU and Local 678, 33-1/3%.

John A. MacKenzie
United States District
Judge

Norfolk, Virginia
April 28, 1972

PLAN TO "TOP AND BOTTOM"
SENIORITY ROSTERS

Effective May 1, 1972

Whereas the United States District Court for the Eastern District of Virginia in the case of Robert Rock et als v. Norfolk and Western Railway Company et als in Civil Action No. 225-69-N has ORDERED the parties, pursuant to its Memorandum Opinion dated January 20, 1972, to submit on or before March 20, 1972, to be effective May 1, 1972, a plan to "top and bottom" the existing seniority rosters of the CT Yard and Barney Yard.

Pursuant to such order, the parties plan as follows:

1. Effective May 1, 1972, Barney Yard Brakemen will be placed at the bottom of the CT Yard Brakemen's seniority roster with a seniority date of May 1, 1972 in the order of their standing on the Barney Yard Brakemen's seniority roster and will have prior rights to work as Barney Yard Brakemen.

2. Effective May 1, 1972, CT Yard Brakemen will be placed at the bottom of the Barney Yard Brakemen's seniority roster with a seniority date of May 1, 1972 in the order of their standing on the CT Yard Brakemen's seniority roster and will have prior rights to work as CT Yard Brakemen.

3. Effective May 1, 1972, new hires will

establish seniority on a single seniority roster. Such seniority will be established on that roster based on first service performed rights in accordance with their standing on the "top and bottom" rosters and in accordance with applicable seniority rules to displace a junior Barney Yard Brakeman or CT Yard Brakeman who does not hold prior rights in the Barney Yard or CT Yard.

(B) Barney Yard Brakemen voluntarily exercising seniority as CT Yard Brakemen in the CT Yard will be required to remain in that Yard for a period of thirty days, except where they can no longer hold an assignment in that yard. A Barney Yard Brakeman who does not stand for work in the Barney Yard may exercise seniority to the CT Yard and upon being recalled to the Barney Yard, will be given three days to return to the Barney Yard. However, if he elects to remain in the CT Yard, he will be treated as an employee making a vonultary move based on the date he is recalled to the Barney Yard.

NOTE: The thirty days or three days referred to above will commence to run on the date he voluntarily exercises seniority or is notified of his recall.

(C) CT Yard brakemen voluntarily exercising seniority as Barney Yard Brakemen to the Barney Yard will be required to remain in that yard for a period of thirty days, except when they can no longer hold an assignment in that yard. A CT Yard Brakeman who does not stand for work in the CT Yard may exercise seniority to the Barney Yard and upon being

recalled in either the CT Yard or Barney Yard.

4. Barney Yard Brakemen and CT Yard Brakemen holding prior rights will not be forced to accept employment or fill vacancies as Barney Yard Brakemen or CT Yard Brakemen except where they now hold prior seniority as Barney Yard Brakemen or CT Yard Brakemen and then in accordance with the agreement rules applicable to their prior right seniority.

5. (A) In any one week, no more than ten present Barney Yard Brakemen shall transfer for the first time to CT Yard work; and there shall be a three-day training period for such transferring Brakemen, during which they shall not be in a pay status. Transfer applications will be approved on a seniority basis.

(B) In any one week, no more than ten present CT Yard Brakemen shall transfer for the first time to Barney Yard work; and there shall be a one-day training period for such transferring Brakemen during which they shall not be in a pay status. Transfer applications will be approved on a seniority basis.

6. Separate Barney Yard Brakemen and CT Yard Brakemen extra lists will be maintained. In the application of the foregoing the following will apply:

(A) Prior right Barney Yard Brakemen or CT Yard Brakemen may fill vacancies in the Barney Yard or CT Yard not filled by prior right employees and may exercise their seniority to the CT Yard, will be given three days to return to the CT Yard. However, if he elects to remain

in the Barney Yard he will be treated as an employee making a voluntary move based on the date he is recalled to the CT Yard.

NOTE: The thirty days or three days referred to above will commence to run on the date he voluntarily exercises seniority or is notified of his recall.

(D) Employees hired after the effective date of this Agreement and given seniority on a single seniority roster will be required to fill assignments either on the Barney Yard or CT Yard in accordance with Schedule Agreements.

DATED AT ROANOKE, VIRGINIA, THIS 8TH DAY OF FEBRUARY, 1972.

FOR NORFOLK AND WESTERN RAILWAY COMPANY:

E. A. MANETTA
Vice President-Personnel

FOR THE EMPLOYEES:

M. Y. LUSK
General Chairman
United Transportation Union-T

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1777

Robert Rock, Ezell B. Johnson, Russell C. Walker, each individually and on behalf of all others similarly situated,

Appellants

-versus-

Norfolk and Western Railway Company, a corporation; United Transportation Union, Lodge No. 550, an unincorporated association; United Transportation Union, an unincorporated association,

Appellees.

No. 72-1778

United Transportation Union Local No. 974, AFL-CIO, an unincorporated association, Robert Rock, Ezell B. Johnson, Russell C. Walker, each individually and on behalf of all others similarly situated,

Appellees,

-versus-

United Transportation Union Lodge No. 550, an unincorporated association,

United Transportation Union, an unincorporated association,

Appellants.

No. 72-1779

United Transportation Union Local No. 974, AFL-CIO, an unincorporated association, Robert Rock, Ezell B. Johnson, Russell C. Walker, each individually and on behalf of all others similarly situated,

Appellees,

-versus-

Norfolk and Western Railway Company, a corporation,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge

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Argued November 1, 1972

Decided February 13, 1973

Before HAYNSWORTH, Chief Judge, and WINTER and RUSSELL, Circuit Judges.

Morris J. Baller and Robert Belton (Victor J. Ashe, Jack Greenberg and William L Robinson on brief) for Appellants Robert Rock, et al. in No. 72-1777, and for Appellees, Robert Rock, et al. in Nos. 72-1778 and 72-1779; James T Turner (William C. Worthington and Williams, Worrell, Kelly and Worthington on brief) for Appellee, Norfolk and Western Railway Company, in No. 72-1777, and for Appellant, Norfolk and Western Railway Company, in No. 72-1779; Willard J. Moody (Walton G. Bondurant, Jr. and Moody, McMurran and Miller on brief) for Appellees, United Transportation Union and United Transportation Union, Lodge No. 550, in No. 72-1777, and for Appellants, United Transportation Union and United Transportation Union, Lodge No. 550 in No. 72-1778.

RUSSELL, CIRCUIT JUDGE

These are three actions under the Civil Rights Act of 1964[1] instituted by the plaintiffs, both individually and as representatives of the class, and by their local union, to remedy alleged discrimination in employment at rail terminal yards operated by the defendant railroad at Norfolk, Virginia. Named as

[1] 42 USC §§2000e et seq.

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defendants along with the railroad are the local union representing the employees at the other terminal yard and the international union with which both locals are affiliated. It is the position of the plaintiffs that the defendant unions aided in the discrimination of which they complain.

At Norfolk, the railroad maintains two terminal yards, adjacent to one another. One is known as the Barney Yard and the other as the CT Yard. The plaintiffs are longtime black employees at the Barney Yard.[2] This yard, which covers a relatively small area of contiguous tracks, is exclusively concerned with the movement of loaded coal cars down an incline to certain mechanized dumpers which empty the coal into waiting vessels for transport abroad. The District Court found that there was no locomotive power and a minimum use of signaling connected with operations in this yard. On the other hand, the CT Yard, physically much alrger than Barney and with a far more complex pattern of trackage, handles freight of every description, including coal. In that connection, its employees move rail traffic with diesel engines "in both directions into and out of a complex of industrial trackage, sidings, yards, stations, crossings, and the like".

So far as this litigation is concerned, the

[2] All of the individual plaintiffs were employees at the time of the filing of the action. Ezell Johnson, employed for many years by the railroad, retired after the action was begun.

operating employees in both Norfolk yards are divided among brakemen, conductors, and car retarder operators. In both yards, the entering job is that of brakeman, with the opportunity to advance successively, according to ability and seniority within the particular yard, to the job of conductor and car retarder, at increasing rates of pay. The hourly or daily rates of pay have always been the same for Barney Yard and CT Yard employees. The employees in both yards are members of, and are represented by, the same international union and the conditions of their employment are governed by a single collective bargaining agreement. They are, however, grouped in separate union locals. Their seniority rights, also, attach only to the yard in which they were originally employed and are not exercisable in the other contiguous yard. Thus, an employee in the Barney Yard has seniority rights in that yard, dating from the time of his employment in that yard, but has no seniority rights in the CT Yard.

As a result of the employment practices followed by the defendant railroad, prior to 1965, the two yards were racially identifiable. To illustrate: In July, 1965, of the 176 brakemen employed at the Barney Yard, only 3 were white; on the other hand, but 3 brakemen out of the 302 employed at the CT Yard were black. This situation resulted from the "nepotistic" employment practices followed by the railroad at the two yards in the pre-1965 period. These practices were described in the findings of the District Court in these words:

> "The few jobs that opened up were quickly filled without any active recruit-

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ment. Any Barney Yard job opening would be first known to the predominately black work force, which would provide black applicants, often relatives, immediately. The pay was good, the work relatively stable, and generally, railroad employment was prestigious in the community.

"The same hiring conditions also pertained in the CT Yard, where a predominately white work force provided white job seekers, again mostly family relatives, for scarce job openings.

"Such a nepotistic hiring provided two things. Fir the Railway, it supplied employees particularly interested in railroad work, employees grounded in railroading through long family connections with the industry. Such attributes were likely to provide, and did, a loyal, interested work force. For the Negroes, it provided a steady, prestigious job of equal pay to their white counterpart.

"As a somewhat vicarious result, it also provided the Railroad with a black and white work force in about equal percentage to the surrounding population - a result which, in most respects, might suit the general purport of the Civil Rights Act of 1964, except in one particular, that work force as to these 'brakemen' was largely segretated into blacks in the

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Barney Yard and whites in the CT Yard."

The plaintiffs contended that since 1965 there had been no substantial change in the hiring pattern followed by the defendant railroad and that the racial identification of the two yards had been, for that reason, substantially maintained. It was further their contention that the work at the CT Yard was more desirable and profitable than that in the Barney Yard. To remedy the disparity and discrimination in employment opportunities existing between the two yards by reason of the racial classification of the two yards, the plaintiffs asked the merger of the seniority rosters in the two yards as well as the merger of the two locals, along with back-pay relief and attorneys' fees.

The District Court, in a carefully prepared memorandum opinion, found that the defendant railroad had violated the Act by "the continued use of a hiring and job assignment procedure after 1965 which would tend (tended) to perpetuate the pre-1965 discrimination" and that it had taken no steps to correct the discriminatory results inherent in such hiring procedures. It further found that "to a degree there is discrimination in the barrier erected which now prevents promotion of Barney Yard men to certain higher job categories" and locked therein "with no access" to positions leading to that "of assistant yardmaster and yardmaster". It found, however, that the work in the Barney Yard was not, as plaintiffs argued, "dirtier or more menial" and concluded that the work in the two yards had such "small vestiges of similarity" as to

constitute "an entirely different trade".

On the basis of such findings, it ordered the railroad to discontinue its "word-of-mouth" hiring practices and to establish a single employment office for both yards. To correct any prejudice sustained by black brakemen in the Barney Yard in promotion rights, it provided a means whereby such employees could qualify for promotion to conductor in either yard. It further ordered that the seniority rosters of the two yards be merged by "topping and bottoming" the two rosters and that the two union locals be merged. It concluded by denying back-pay and by granting attorneys' fees to plaintiffs' counsel in the sum of $15,000, payable two-thirds by the railroad and one-third by the defendant union.

All parties have appealed. The railroad and union attack the finding made against them of a violation of the Act. The union, also, complains that the special seniority rights granted the Barney Yard brakemen in qualifying for the conductors' roster discriminates unfairly against CT Yard brakemen who have qualified for such roster. The plaintiffs, on the other hand, by their appeal, object to the merging of the seniority rosters on a "topping and bottoming" basis as inadequate, and complain of the failure to grant any back-pay relief and of the inadequacy of the allowance by way of attorneys' fees.

I

The findings by the District Court that, in its hiring practices, the defendants had

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violated the Act, though challenged by the defendant railroad and the defendant union is not clearly erroneous and is accordingly affirmed.

II

There seems to be no dispute among the parties that, if the finding of a violation of the Act is sustained, some form of merger of the seniority rosters at the two yards is a proper remedy. The real issue in the appeal revolves about the manner in which, accepting such finding of a violation, the seniority rosters at the two yards should be merged. The District Court ordered what has been described in the record as a "topping and bottoming" merger. In this type of merger, each employee would retain his existing position on the seniority roster of the yard where he is presently employed and would be placed at the bottom of the roster in the other yard as of the date of the merger. This would mean the continuance of two seniority rosters, with each employee having different seniority standing on the different rosters; for example a Barney brakeman with ten years' seniority at such yard would retain that seniority in the Barney Yard but would acquire seniority at the CT Yard only as of the date of the merger. It is the contention of the plaintiffs that the results of such a form of merger would provide no actual relief for the older Barney Yard employees. Railroad employment is contracting and the opening up of new jobs is becoming increasingly rare. If a Barney Yard brakeman were to be relegated to the bottom of the seniority list at the CT Yard, it is unlikely that

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he would ever find an acceptable opening at the CT Yard which he could claim under the seniority rights that would be given him at the CT Yard.[3] For these reasons, the plaintiffs press for what they call a "dove-tailing" form of merger of the two seniority rosters. Such a merging would create a single terminal seniority roster for both yards, thereby permitting the employees at both yards to compete for any job vacancies at either yard on the basis of ther terminal (as distinguished from yard) seniority, established by the date of their employment.

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[3] See United States v. The Chesapeake and Ohio Railway Company (4th Cir. 1973) F. 2d , decided December 26, 1972, involving two yards similar to those of the defendant railroad in these cases located at Newport News, Virginia. However, there were important differences in the cases. As the District Court remarked in its opinion in these cases, "In the C&O case, absolutely no hiring took place between passage of Title VII in 1965 and January 1, 1970. After employment was reactivated by C&O in January, 1970, the evidence presented in that case showed every affirmative effort on the part of the defendant, to recruit blacks for the formerly all-white yard and whites for the formerly all-black yard. * * * Such is not the situation, we find, in the case at bar."

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The rule is well-established that, where discrimination violations of the Act have been found, the remedy granted must eliminate all residual effects of past discrimination to the greatest extent practical. It cannot be gainsaid that the relief demanded by the plaintiffs would more effectively remove the effects of the illegal discrimination than that granted by the limited change made in the seniority systems in the two yards by the District Court. The railroad and the union would justify the more limited type of merger ordered by the District Court as necessary to the safe and efficient operation of the yards. They emphasize that the tasks in the CT Yard require greater and more specialized skills than do the simpler responsibilities in the Barney Yard. The District Court accepted this argument, finding, as has already been pointed out, that there were "small vestiges of similarity" in the work in the two yards. The difficulty with this finding is that it is contradicted both by the prior conduct of the railroad and by its admissions in the record that a "dove-tailing" of the seniority rosters in the two yards was practical. As a matter of fact, the qualifications for employment as a brakeman, the entering classification in both yards, are the same in both the Barney and CT Yards. And the breaking-in period for a CT Yard brakeman, hired without prior experience, is a mere five and one-half days. If an inexperienced employee can qualify with such limited training, it is inconceivable that an experienced Barney Yard brakeman would be unqualified to work as a brakeman in the CT Yard, particularly since one official of the railroad stated that the duties of a brakeman in

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the two yards were "basically similar". Moreover, at various times during emergencies, Barney Yard employees have been transferred to work in the CT Yard. There was no suggestion by the railroad or the union that their work was unsatisfactory.

To meet the test of "business necessity" as an exception under the Act, an employment practice, such as the maintenance of separate seniority rosters in the contiguous yards in this case, "must not only foster safety and efficiency, but must be essential to that goal." (Italics in opinion.) United States v. St. Louis-San Francisco Railway Co. (8th Cir. 1972) 464 F. 2d 301, 308, cert. den. ____ U. S. ____.[4] The record herein will not support a finding of business necessity, based on the application of this test, as a warrant for denying unto the plaintiffs a merger of the seniority rosters in the two yards into a single terminal roster, and such merger is an appropriate remedy under the circumstances of this case. See Robinson v. Lorillard Corp., supra, 444 F. 2d at p. 798.

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[4] See, also, Robinson v. Lorillard Corporation (4th Cir. 1971) 444 F. 2d 791, 798, n. 7, cert. den. 404 U. S. 1006:

> "It should go without saying that a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory."

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A single terminal seniority roster would necessarily provide for the preservation of the rights of all incumbent employees at both yards and would permit no idsplacement of incumbent employees.[5] It would be limited in operation to bidding for future vacancies in either yard and, as plaintiffs concede, would remain subject to the overriding consideration of basic job competency.[6] With particular reference to the right of Barney Yard brakemen to qualify for promotion to conductors, any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this higher classification, not give such brakemen any higher or broader rights that those enjoyed or granted to CT Yard brakemen, who had qualified for promotion to conductors. Recognizing the complexities of railroad employment, the actual formulation of the specific terms and provisions of a merged terminal seniority roster, covering both yards, should be the task of the District Court, which could, before so doing, afford the parties themselves an opportunity to submit their own proposed "dove-tailing" merger plans.

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[5] See Local 189, United Papermak. & Paperwork. v. United States (5th Cir. 1969) 416 F. 2d 980, 987, n. 8, cert. den. 397 U.S. 919.

[6] Cf., United States v. The Chesapeake and Ohio Railway Company, supra.

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The cause will accordingly be remanded to the District Court with instructions to prepare, after hearing, a plan of merger of the two seniority rosters into a single seniority roster, comporting to the general principles hereinbefore stated.

III

For the same reasons that require the merger of the two seniority rosters at the yards, the District Court was clearly right in ordering a merger of the local unions covering the employees in the two yards. United States v. Jacksonville Terminal Company (5th Cir. 1971) 451 F. 2d 418, 457, cert. den. _____U. S. _____. Its action in this respect is affirmed.

IV

The plaintiffs take exception to the disallowance of back-pay. They contend that the opportunities for work and accordingly the earnings of the employees in the Barney Yard were less than in the CT Yard. They complain, also, that the chances for advancement in the two yards were different. The District Court, while making no specific findings of fact on this issue, was apparently influenced in the denial of back-pay by the speculative nature of such claims and by the fact that the railroad had itself suggested as early as 1967 a merger of the two seniority rosters, only to be thwarted by the reluctance of the union to agree. The railroad contended the agreement of the union was required for any such change

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in the collective bargaining agreement under the terms of the Railway Labor Act.[7] The plaintiffs suggest, in reply, that the offer of the railroad to merge the seniority rosters, made in 1967, was belated and followed the filing of a complaint by them with the EEOC. They, also, raise a question of the good faith of the railroad in making its offer. Since we have concluded that the plaintiffs are entitled to a more liberal form of merger of the seniority rosters, it will be appropriate for the District Court to consider anew the issue of the right of the plaintiffs to back-pay against either the railroad or the union, or both, and, in that connection, it should make specific findings on the conflicting claims of the parties on this issue.

V

The plaintiffs urge that the award of attorneys' fees, as made by the District Court, was too niggardly. The allowance of attorneys' fees in cases of this character are properly for the District Court, based on appropriate findings, and will be overturned only for clear error. In the award which was made, the District Court made no findings which disclose the basis of its award. But since these cases are being remanded for further proceedings, the District Court should make its award anew, taking into consideration the additional services of plaintiffs' counsel, including those relating to

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[7] 45 USC §151, et seq.

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this appeal and the additional proceedings in the District Court. Findings to disclose the basis of the ultimate award should be made.

AFFIRMED IN PART AND REMANDED IN PART WITH DIRECTIONS.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
VIRGINIA
NORFOLK DIVISION

ROBERT ROCK, ET AL,

Plaintiffs

v. Civil Action No. 255-69-N

NORFOLK AND WESTERN RAILWAY
COMPANY, ET AL,

Defendants

OPINION AND ORDER

Preliminary conferences, an evidentiary hearing, and final arguments have now been had in this matter, on remand from the United States Court of Appeals for the Fourth Circuit under order of February 13, 1973, reported in 437 F. 2d 1344 (1973).

The issues, as defined by Judge Russell of the Appellate Court, are threefold:

(1) to formulate a comprehensive plan for the dovetailing of the seniority rosters of brakemen, conductors, and car retarders in the Barney Yard and General Classification Yard of the Norfolk and Western Railway Company at its Terminal at Norfolk;

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(2) to examine the defendants' liability for back pay; and

(3) to make findings and disclose the basis of the award of attorneys' fees, taking into consideration additional services of plaintiffs' counsel in the matter of the appeal and hearings on remand.

In addition to the matters directed to this Court by Judge Russell, the plaintiffs press two entirely new issues: (1) to examine the entitlement of the plaintiffs to an upward adjustment of their monthly guarantees under the Nickel Plate Merger Plan; and (2) to award costs. At no time prior in the four year record of this case before this Court has there been any mention of guarantees under the Nickel Plate Merger Plan, that is until February 8, 1974, on final argument of the matter on remand. We deem it inappropriate to move to new material at this late date. With regard to the matter of costs, that will proceed for assessment as provided in the statute and can be examined for verity after final applicable appellate directions, if any.

The plaintiffs' suggestion to advance these two additional issues is therefore DENIED.

I

THE DOVETAILING OF SENIORITY ROSTERS FOR BRAKEMEN, CONDUCTORS AND CAR RETARDERS IN THE BARNEY YARD AND GENERAL CLASSIFICATION YARD IN THE NORFOLK AND WESTERN TERMINAL AT NORFOLK.

Attached hereto as "Appendix A," is a detailed merger plan made part and parcel of this decree by reference thereto. The plan, as written by the Court, is an amalgamation of the plans submitted by all parties. There were points of disagreement to which the Court has reacted in accordance with its view of the evidence and the directions. The opinion in United States v. Chesapeake and Ohio Railway Company, 471 F. 2d 582 (4th Cir. 1972), has also been considered.

The dovetailing of the entry level rosters of brakemen for both Barney Yard and CT Yard is to be accomplished by reference to Terminal hire date. No discord has been registered to that effort.

The dovetailing of the rosters in both yards of the third-step progression, car retarder, is to be accomplished on the basis of the date of promotion to car retarder. There is no disagreement.

However, in dovetailing the second-step classification, the conductors' roster, there is argument. The plaintiffs contend that because CT Yard brakemen are shown by statistics as having progressed more rapidly

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to CT Yard Conductor than Barney Yardmen to the Barney Yard Conductor level, that a different formula should be employed to merge the conductors' seniority roster. According to the plaintiffs, a Barney Yard brakeman moving onto the conductors' roster for the first time would take with him his brakeman date-of-hire, and thus move ahead of the CT Yard conductors already on the roster with a prior conductor seniority, but with a later Terminal hire date.

On the facts of this case, we are not persuaded by the plaintiffs' contentions. In our view such a merger of the conductors' roster is one hundred eighty degrees from the "dove-tailing" of rosters that this Court was directed to accomplish. It would assign to Barney Yard brakemen, just entering upon the conductors' roster, a super-seniority in relation to CT Yard conductors who were prior in time on that roster.

We do not believe that United States v. Chesapeake and Ohio Railway Company, supra, compels such a direction. The language in that case, based apparently on what the appellate court understood the facts to be, was:

> ". . . [The District Court] decree [should] provide that as between a Barney yard brakeman and a General yard brakeman . . . competing for a conductor's job, company seniority [original hire date in that opinion] shall determine rank . . . ." 471 F. 2d at 590.

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We construe that language to mean brakeman contending against brakeman, and not a Barney Yard brakeman competing against a CT Yard conductor.

In Judge Russell's remand opinion in the case at bar, reported, Rock v. Norfolk and Western Railway Company, 473 F. 2d 1344 (4th Cir. 1973), delivered after United States v. Chesapeake and Ohio Railway Company, supra, on page 1349, the court found that a merger of the seniority rosters into a single terminal roster was the appropriate remedy because such a single roster "would necessarily provide for the preservation of the rights of all incumbent employees at both Yards and would permit no displacement of incumbent employees." Surely, placing a Barney Yard brakeman, just coming on the merger list, ahead of a CT yardman already on that list with patent prior seniority would be a displacement which the Court opposed.

Addressing itself to that specific point, the court said on page 1349:

> "With particular reference to the right of Barney Yard brakemen to qualify for promotion to conductors, any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this higher classification, not give such brakemen any higher or broader rights than those enjoyed or

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granted to CT Yard brakemen, who had qualified for promotion to conductors." [Emphasis added].

It would seem singularly inappropriate in these two separate and distinct yards to assign the past rate of promotion as expressed in terms of speculative statistics, as a reason for the award of super-seniority, one employee over another, on the conductors' roster. The many factors which apply varyingly to individuals and their personal work preferences, and commented upon in succeeding paragraphs of this decree, point out the speculative nature of such statistics.

As shown in the appropriate provisions of the appendix, to accomplish dovetailing of rosters, we have concluded that the contentions on various points are best settled as follows:

(1) The decree will not require brakemen, conductors, or car retarders to work in a Yard in which they are not qualified. This is in keeping with the Court's previous determination, not disturbed on appeal, that the two Yards represent separate and distinct work.

(2) Training time at all levels will be on a pay status.

(3) Incumbency protection at all levels shall be afforded to the job held thirty (30) days after this decree becomes effective. We specifically regret the Unions' suggestion of a "Sadie Hawkins Day."

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(4) The conductors' rosters will be merged on the basis of conductor seniority.

(5) The right of Barney Yard brakemen to apply for CT Yard conductors' training will be reopened for a period of forty-five (45) days after the entry of this decree.

II

BACK PAY ISSUE

In exercising the discretion which we believe the statute gives us, we are persuaded by many factors that no back pay is here justified.

(a) This is not the case of disparate wage levels in various departments which dictated award of back wages in Griggs v. Duke Power Company [1] where blacks were hired only in the lowest paying labor force; or the reasoning of the order in Jones v. Lee Way Motor Freight, Inc.[2], in which black city drivers were paid less than white line drivers; or as the situation in Local 189, United Papermak. & Paperwork. v. United States [3], in which white jobs paid more than black jobs; or as in Robinson v. Lorillard Corporation[4], where Negro jobs were lower paying and less desirable.

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(1) 401 U.S. 424, 91 S.Ct. 849 (1971).
(2) 431 F.2d 245 (10th Cir. 1970).
(3) 416 F.2d 980 (5tn Cir. 1969).
(4) 444 F.2d 791 (4th Cir. 1961).

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In the instant case, Barney Yard employees and CT Yard employees, in each of three classifications in each yard were paid exactly the same at each step.

The argument is made that Barney Yard brakemen have not progressed to conductor in that Yard as quickly as CT Yard brakemen to conductor in the CT Yard. This may be true. We maintained in the original district court findings, and with no dissent in the Fourth Circuit, that the two yards are distinct and separate. The Yards have not been ordered merged. Progression may be slower in one Yard than another, but this is the nature of the work of the Yard, not the racial characteristics of those laboring therein.

There is no really credible evidence that any Barney Yard brakeman ever applied for and was refused CT Yard work. Not many applied, and four or five were accepted. Only one man (Johnson) suggested that he might have applied and been denied, but quite frankly this Court put little credence in his memory and testimony.

(b) The Norfolk and Western, in an offer which this court has already found to be bona fide, proposed, in 1968, that the rosters of the two Yards be dovetailed. This was communicated to the Unions. The proposition was turned down by the Unions. It is hard for this court to believe, and frankly, it doubts, that such offer could be known to the Unions and not to the nominal plaintiffs in this suit, most of whom were local union officials. In 1968, they, as rank and file members, simply did not want

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to voluntarily chance a loss of seniority by any dovetailing of rosters, and they ought not to be allowed back pay now for something they opposed then.

(c) The argument of plaintiffs that the reason for the slower rate of promotion of Barney Yardmen is impaled on the horns of pure speculation. We are cognizant that there are fewer conductor billets in the Barney Yard. The lag of coal exports during the late sixties shut down employment and promotions. These conditions would support slow promotions. Statistics would only record what was obvious. But whether an employee would seek to move from Barney Yard brakeman to conductor invokes a personal choice which statistics would not reflect.

Repeatedly, over many days of hearings in this and allied Title VII complaints against other railroads, we have been constantly reminded of the sanctity with which railroad employees regard seniority. Time after time, seniority on the Brakemen's roster was a lever used to get prime working hours and first call on overtime. Many employees, for their own purposes, do not seek conductor work (which pays only $2 or $3 more per day). They prefer a daytime 7:00 A. M. to 3:00 P. M. shift rather than night shifts as a conductor. Many prefer to work from the extra board, as brakemen, with an eye to overtime or advantageous time off. In short, progression through the three pay grades, seems, often as not, a matter of personal whim and not opportunity. Our reference in the prior opinion to employees in the Barney Yard being

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"locked in," to a degree, only spoke of promotion to assistant yardmaster and yardmaster. The reference there had nothing to do with progression within the three grades of the yards themselves. Since our view of the evidence indicates only three yardmasters in twenty-five (25) years, this could hardly be urged to award back pay.

(d) Lastly, we held that the two Yards were indeed separate and distinct. The appellate court agreed.

We thought that the nepotistic hiring practices which accentuated blacks' employment in the Barney Yard and white employment in the CT Yard, was not so legally sinful as it was a source of abrasion which would be stopped. The appellate court agreed.

We thought the best mode of merging the rosters to least dislodge an employee's established and cherished seniority was to top and bottom the rosters. The appellate court disagreed, but only as to the mode of roster merger and ordered the rosters to be merged by dovetailing. This has now been accomplished.

This illustrates, we think, a very bland discrimination, upon which the plaintiffs would emboss great money imprint, in other words, an inch of discrimination and a mile of cure.

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III

We are advised by all parties that they have agreed among themselves on a settlement of the attorneys' fees issue and that is not now before this court.

In concluding, to review:

(1) A plan for dovetailing the rosters of the Norfolk and Western's Barney Yard and General Classification Yard at Norfolk is attached as "Appendix A."

(2) Back pay for plaintiffs is DENIED.

(3) The parties have settled the attorneys' fee issue and nothing is required therein by this court.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
May 17, 1974

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 255-69-N

ROBERT ROCK, ET AL,

Plaintiffs

v.

NORFOLK AND WESTERN RAILWAY COMPANY, UNITED TRANSPORTATION UNION, an unincorporated association,

and

UNITED TRANSPORTATION UNION LODGE NO. 550, an unincorporated association,

Defendants

APPENDIX FOR DOVETAILING ROSTERS

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1. Dovetailing Brakeman Rosters

(a) The presently existing Barney Yard and CT Yard brakeman seniority rosters shall be dovetailed. The Norfolk and Western

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Railway Company shall publish and post the consolidated roster within thirty (30) days after the date of this decree. The consolidated roster shall rank brakemen according to their "Terminal seniority", which is hereby defined as their brakemen seniority date on existing CT Yard or Barney Yard brakemen seniority rosters, or on the single roster for new hires invoked by this Court's decree of April 28, 1972, and appendix attached thereto. In the case of ties, the first tie in seniority position (date) shall be broken by drawing of lots by respective local chairmen, supervised by the Railway Company, to determine whether the Barney Yard employees or CT Yard employees involved shall rank higher on the dovetailing roster. Each succeeding tie shall be broken by alternating from the decision on the drawing and so on until all ties are resolved.

(b) All Barney Yard and CT Yard brakemen shall have a period of ninety (90) days following promulgation of the consolidated roster in which to protest or question their Terminal seniority date and rank shown thereon as to accuracy by procedures presently existing between the Railway Company and United Transportation Union and/or its Local 48.

(c) All assignments, furloughs, displacements and recalls of Norfolk Terminal brakemen in both Yards shall be controlled by Terminal seniority as shown on the consolidated roster, beginning thirty (30) days from the date of this decree. In the administration of this provision, the conditions and explanations set forth below shall apply:

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(i) Notwithstanding the fact that all Norfolk Terminal brakemen shall hold Terminal seniority applicable throughout Norfolk Terminal (Barney Yard and CT Yards), no brakemen shall be required or allowed to work in a Yard in which he is not qualified. The Railway Company shall determine whether a particular employee is qualified to work in a particular Yard. The Railway Company shall maintain and periodically publish a list or lists showing in which Terminal Yard or Yards each Terminal brakeman has qualified.

(ii) Brakemen who first performed Norfolk Terminal brakeman service in the Barney Yard prior to May 1, 1972, are presumptively qualified for brakeman positions in the Barney Yard. All brakemen who first performed Norfolk Terminal brakeman service in the CT Yard prior to May 1, 1972 are presumptively qualified for brakeman positions in the CT Yard. Brakemen whose first Norfolk Terminal brakeman seniority was on May 1, 1972, or later are presumptively qualified for brakeman jobs in either yard.

(iii) All Barney Yard brakemen who, pursuant to Paragraph 5(a) of the "top and bottom" plan imposed by the Court's decree of April 28, 1972, successfully completed the three-day training period for CT Yard work and thereafter "transferred" to the CT Yard for at least one shift's work shall be presumptively qualified for brakeman work in the CT Yard. Barney Yard brakemen who completed such training but did not subsequently work in the CT Yard shall, if the company deems it necessary, be required to complete further

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training of up to three days, during which they shall be on pay status at the rate of pay received by such brakemen for their last service for the Railway Company. Upon completion of the training period they shall be presumptively qualified for brakeman work in the CT Yard.

(iv) Barney Yard and CT Yard brakemen not yet qualified as brakemen in both Yards may qualify under the following conditions and provisions: In any one week, no more than ten present Barney Yard brakemen shall qualify for the first time for CT Yard work and there shall be a three-day training period for such qualifying brakemen, during which they shall be in a pay status at the rate of pay received by such brakemen for their last service for the Railway Company. Applications to qualify for CT Yard work will be approved on a seniority basis. In any one week, no more than ten present CT Yard brakemen shall qualify for the first time to Barney Yard work; and there shall be a one-day training period for such qualifying brakemen during which they shall be in a pay status at the rate of pay received by such brakemen for their last service for the Railway Company. Applications to qualify will be approved on a seniority basis.

(v) All vacancies, as defined in Article 41 of the Schedule Agreement, in regular brakeman assignments after the thirtieth day following this decree shall be filled by qualified brakemen according to Terminal seniority as defined herein.

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(vi) The operation of the provisions of this decree shall not result in the displacement of incumbent brakemen in either Yard from positions which they hold as of the date of this decree on a "regular assignment" basis by a brakeman originally from the other Yard, so long as the incumbent brakeman remains in that assignment. The Extra Boards shall not be considered "regular assignments."

(d) A single Extra Board shall be maintained for both Yards. No brakeman on the Extra Board shall be required or allowed to work in a Yard where he has not qualified. Local 48 shall notify the Railway Company from time to time which local chairman will control, pursuant to Article 41(3) of the Schedule Agreement, the single extra list established herein. The local chairman in control shall alternate between the two chairmen of Local 48 on a month-to-month basis.

(e) Call-up for emergency brakeman work to the extent that seniority is a factor under the applicable collective bargaining agreements, shall be on the basis of Terminal seniority.

(f) Employees qualified for brakemen assignments under the terms of this decree will be required to fill such assignments in accordance with Schedule Agreements.

2. Provisions Applicable to Conductors

(a) The Barney Yard and CT Yard conductor seniority rosters shall be dovetailed.

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The Norfolk and Western Railway Company shall publish and post the consolidated roster within thirty (30) days after the date of this decree. The consolidated roster shall rank conductors according to their conductor seniority dates on respective conductor rosters existing at the date of this decree.

(b) All Barney Yard and CT Yard conductors shall have a period of ninety (90) days following promulgation of the consolidated roster in which to protest or question their conductor seniority date and rank shown thereon as to accuracy by procedures presently existing between the Railway Company and United Transportation Union and/or its Local 48.

(c) All assignments of qualified Norfolk Terminal conductors to vacant positions in both Yards shall be made on the basis of conductor seniority, as shown on the conductors' roster consolidated pursuant to 2(a) above, beginning thirty (30) days from the date of this decree.

In the administration of this provision, the conditions and explanations set forth below shall apply:

(i) Notwithstanding the fact that all Norfolk Terminal conductors shall hold conductor seniority applicable through Norfolk Terminal (Barney Yard and CT Yard), no conductor shall be required or allowed to work as a conductor in a Yard in which he is not qualified. The Railway Company shall determine whether a particular conductor is qualified to

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work in a particular Yard in accordance with the provisions set forth below. The Norfolk and Western Railway Company shall maintain and periodically publish a list or lists showing in which Terminal Yard or Yards each Terminal conductor has qualified.

(ii) All conductors who have performed compensated Norfolk Terminal conductor service in the Barney Yard prior to May 1, 1972, are presumptively qualified for conductor positions in the Barney Yard. All conductors who have performed compensated Norfolk Terminal conductor service in the CT Yard prior to May 1, 1972, are presumptively qualified for conductor positions in the CT Yard. All persons who had not performed conductor service prior to May 1, 1972 may qualify under the provisions set forth below if they are eligible, or under the procedures existing between the Norfolk and Western Railway Company and the United Transportation Union and/or its Local 48. All persons who are promoted to conductor after the date of this decree shall be presumptively qualified for conductor positions in either Yard.

(iii) A conductor who is qualified in the CT Yard but is not qualified for conductor positions in the Barney Yard, in order to qualify as a Barney Yard conductor, shall undergo training for up to three 8-hour shifts as a Barney Yard conductor and/or Barney Yard brakeman, during which he shall be in a pay status, at the rate of pay received by such trainee for his last service for the Railway Company, and thereafter pass the written Barney Yard conductor's examination. A

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conductor who is qualified in the Barney Yard but is not qualified for conductor positions in the CT Yard, in order to qualify as a CT Yard conductor, shall first qualify as a CT Yard brakeman under the provisions of Paragraph 1(c) (iv) above, shall thereafter perform 45 days of compensated service as a CT Yard brakeman and thereafter pass the written CT Yard conductor's examination. Any conductor attempting, under the provisions of this paragraph, to qualify in a Yard where he is not qualified shall remain eligible to take the appropriate conductor's examination until he has failed it on three separate occasions. The foregoing provisions of this subparagraph are subject to the limitation that any conductor not deemed qualified in both the CT Yard and the Barney Yard must elect, within 180 days of the date of this decree, to take the conductor training in the opposite Yard and be qualified within one year from the date of this decree, or, if delay in completing qualification beyond one year is beyond the control of the conductor, then within a reasonable time after one year from the date hereof. If a conductor fails to elect to take the qualifying training within 180 days from the date of this decree, or if he so elects but fails to qualify within the time prescribed, then his initial seniority on the consolidated conductor's roster shall be applicable only to conductor positions in the Yard in which he was qualified on the date of this decree. If such conductor subsequently becomes qualified in the Yard in which he was not qualified as a conductor on the date of this decree, then he shall have seniority applicable to positions in such other Yard as of the date he passes the conductor's

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examination applicable to such other Yard.

(iv) All Barney Yard brakemen and CT Yard brakemen who, pursuant to Pararaphe 1(C) and (D) of the Court's decree of April 28, 1972, have qualified as CT Yard conductors but did not work as a CT Yard conductor thereafter, may, if the Company deems it necessary be required to complete further training of up to five days, during which they shall be on pay status at the rate of pay received by such brakemen for their last service for the Railway Company. Upon completion of the training period they shall be presumptively qualified for service as CT Yard conductors.

(v) All Barney Yard brakemen and CT Yard brakemen who did not or were not able to avail themselves of the training opportunities provided by Paragraph 1 (C) and (D) of the Court's decree of April 28, 1972 shall have further opportunity to do so according to the same provisions, except that the application to the Company must be made within 45 days of the date of this decree. To that end, all CT Yard brakemen and all Barney Yard brakemen not presently qualified as CT Yard conductors shall have the opportunity to qualify as such according to the following provisions:

The Company shall advise all present CT Yard brakemen and Barney Yard brakemen, in writing, that they may receive training for the position of Terminal conductor and if they qualify, will be promoted to the position in accordance with the terms of this decree. Brakemen who desire such promotion must so

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indicate to the Company in writing within 45 days of this decree. The Company shall provide each brakeman with an appropriate form for making the selection. The written notice given to each present brakeman shall state: (1) the pay rate of conductor; (2) the standard test qualifications for promotion to conductor; and (3) a summary description of the training to be given. Any Barney Yard brakeman or CT Yard brakeman who elects not to avail himself of specific promotion opportunities to conductor provided in this decree shall retain his right to such promotion in accordance with the Yardmen's Agreement.

The Company shall offer the training program to an employee provided he has a CT Yard or Barney Yard brakeman's seniority date of September 18, 1963 or earlier. The Company may limit each training class to ten (10) Terminal brakemen to be selected in Terminal seniority order.

The Company shall pay such brakeman at the daily rate of the job he held immediately prior to the training period during the time actually spent in training under the supervision of the Company instructors, but not to exceed 80 straight time hours or 10 days' pay at the straight time rate, unless the collective bargaining agreement provides otherwise. Such brakeman shall remain eligible to take the conductor's examination unless he has failed it on three separate occasions. The Company shall offer the examination to present brakemen who make request in writing to take it, but the Company shall not require such employee to take the examination before one year and a half

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after he has begun training or one year after his last attempt to pass the examination.

Brakemen promoted to terminal conductor shall establish a seniority date on the conductor's roster on the date they pass the conductor's examination. If two or more brakemen pass the conductor's test on the same day, they shall establish seniority on the conductors' roster in the order of their Terminal seniority dates.

In instances deemed necessary by it, the Company may require brakemen so promoted to qualify for their first service as conductors in the CT Yard occurring more than six (6) months after promotion, which such promoted conductors have not worked as brakemen in the CT Yard, by rendering up to forty-five (45) days' service as CT Yard brakemen at the rate of pay received for their last service for the Railway Company.

(vi) All vacancies, as defined in Article 41 of the Schedule Agreement in regular conductor assignments after the thirtieth (30th) day following this decree shall be filled by qualified conductors according to their conductors' seniority, as shown on the consolidated conductors' roster.

(vii) The operation of the provisions of this decree shall not result in the displacement of incumbent conductors in either Yard from positions which they hold as of the date of this decree on a "regular assignment" basis by a conductor originally from the other Yard so long as the incumbent conductor remains in

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that assignment.

(d) Call-up for emergency conductor work, to the extent that seniority is a factor under the applicable collective bargaining agreements, shall be on the basis of applicable conductor seniority, as shown on the consolidated conductors' roster.

(e) Employees qualified for conductor assignments under the terms of this decree will be required to fill such assignments in accordance with Schedule Agreements.

3. Provisions Applicable to Car Retarder Operators

(a) The presently existing Barney Yard and CT Yard car retarder operator rosters shall be dovetailed. The Norfolk and Western Railway Company shall publish and post the consolidated roster within thirty (30) days after the date of this decree. The consolidated roster shall rank car retarder operators according to their car retarder operator seniority date on existing CT Yard or Barney Yard car retarder operator seniority rosters.

(b) All Barney Yard and CT Yard car retarder operators shall have a period of ninety (90) days following promulgation of the consolidated roster in which to protest or question their car retarder operator seniority date and rank shown thereon as to accuracy, by procedures presently existing between the Railway Company and United Transportation Union.

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(c) All assignments of Norfolk Terminal car retarder operators in both Yards shall be controlled by car retarder operator seniority as shown on the consolidated car retarder operator roster beginning thirty (30) days from the date of this decree. In the administration of this provision, the conditions and explanations set forth below shall apply:

(i) Notwithstanding the fact that all Norfolk Terminal car retarder operators shall hold car retarder operator seniority applicable to both Yards, no car retarder operator shall be allowed to work in a Yard in which he is not qualified. The Railway Company shall determine whether a particular car retarder operator is qualified to work in a particular Yard. The Railway Company shall maintain a list or lists showing in which Terminal Yard or Yards each Terminal car retarder operator has qualified.

(ii) Car retarder operators who first performed Norfolk Terminal car retarder operator service in the Barney Yard prior to May 1, 1972 are presumptively qualified for car retarder operator positions in the Barney Yard. All car retarder operators who first performed Norfolk Terminal car retarder operator service in the CT Yard prior to May 1, 1972 are presumptively qualified for car retarder operator positions in the CT Yard.

(iii) A car retarder operator who is qualified in the CT Yard but is not qualified for car retarder operator positions in the Barney Yard, in order to qualify as a Barney Yard car retarder operator, shall undergo training for

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up to three (3) days as a Barney Yard car retarder operator, during which he shall be in a pay status. A car retarder operator who is qualified in the Barney Yard but is not qualified for car retarder positions in the CT Yard, in order to qualify as a CT Yard car retarder operator, shall undergo training for up to three (3) days as a CT Yard car retarder operator, during which he shall be in pay status.

(iv) All Barney Yard and CT Yard brakemen not previously qualified as car retarder operators in either or both Yards, shall be allowed to qualify in either Yard pursuant to the procedures established by the collective bargaining agreement as amended by this decree and usual practice thereunder.

(v) The operation of the provisions of this decree shall not result in the displacement of incumbent car retarder operators in either Yard from positions which they hokd, as of the date of this decree, on a "regular assignment" basis, so long as the car retarder operators remain in that assignment.

(vi) All vacancies, as defined in Article 43 of the Schedule Agreement in regular car retarder operator assignments after the thirtieth (30th) day following this decree shall be filled by qualified car retarder operators according to their car retarder seniority as shown on the consolidated car retarder operator roster.

(d) Call-up for emergency car retarder operator work, to the extent that

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seniority is a factor under the applicable collective bargaining agreements, shall be on the basis of applicable car retarder operator seniority.

(e) Employees qualified for car retarder operator assignments under the terms of this decree will be required to fill such assignments in accordance with the Schedule Agreements.

4. Modification of Existing Collective Bargaining Agreement

To the extent that this decree modifies the applicable provisions of the collective bargaining agreement between the Railway Company and United Transportation Union presently in effect, the provisions of this decree shall govern. In all matters not modified by this decree the applicable collective bargaining agreements shall continue in full force and effect.

5. Resolution of Disputes Concerning These Provisions

Disputes of claims of individual Norfolk yardmen which involve the application of these provisions and which result in the filing of time claims, and disputes concerning the interpretation of the provisions of the Schedule Agreement or any other Supplemental Agreement which is incorporated by reference in this decree, shall be handled in accordance with the grievance provisions established by the applicable collective bargaining agreements and practices thereunder and by the

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Railway Labor Act (45 U. S. C. §151 et seq.). In the event of disputes concerning the interpretation of the provisions of this decree, the parties shall adhere to the following procedure. First, the respective local chairman and a designated representative of the Railway Company shall attempt to agree unanimously upon the correct interpretation. If they unanimously agree, their interpretation shall become binding upon the parties if approved by the general chairman and the Railway Company's vice-president-labor relations, who shall render that interpretation in writing with copies to each party. If no agreement is thereby reached, the attorneys for the respective parties or their designated representatives shall attempt to agree upon the correct interpretation and shall render the interpretation agreed upon by them in writing, with copies to each party. In the event that the parties' attorneys are unable to resolve the dispute, the complaining party may make application to the Court for a binding interpretation after due notice to the other parties.

6. Terminal Service by Yardmen

The Railway Company may require a brakeman, conductor or car retarder operator qualified in only one Yard to qualify as a brakeman, conductor or car retarder operator, respectively, in the other Yard.

7. Notification of Seniority Dates

All Yardmen affected by this decree shall be personally mailed or delivered a copy

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of this decree by Local 48 according to its usual procedures for communicating with its membership. All Yardmen affected by this decree shall be notified of their various seniority dates by posting of seniority rosters on established bulletin boards in the CT and Barney Yards and by the furnishing of the current dovetailed rosters to the respective local chairmen.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 74-1788

The United Transportation Union Local No. 974, AFL-CIO, an unincorporated association,

Plaintiff

Robert Rock, Ezell B. Johnson, Russell C. Walker, each individually and on behalf of all others similarly situated,

Appellants

v.

Norfolk and Western Railway Company, a corporation; United Transportation Union, Lodge No. 550, an unincorporated association; United Transportation Union, an unincorporated association,

Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, District Judge

Argued February 4, 1975

Decided September 22, 1975

Before WINTER, CRAVEN, and WIDENER, Circuit Judges.

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Morris J. Baller (William T. Mason, Jr., Robert Belton and Jack Greenberg on brief) for Appellants; James T. Turner (Williams, Worrell, Kelly and Worthington on brief) for Appellee Norfolk and Western Railway Company; Walton G. Bondurant, Jr. (Willard J. Moody; Moody, McMurran and Miller and Robert Hart on brief) for Appellees United Transportation Union Lodge No. 550 and United Transportation Union.

WINTER, Circuit Judge:

In a previous appeal, Rock v. Norfolk and Western Railway Company, 473 F. 2d 1344 (4th Cir.), cert. denied, 412 U.S. 993 (1973), we affirmed the district court's conclusion that the railroad (N & W) and the unions had engaged in hiring practices illegal under the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., at the mostly black Barney Uard and the mostly white CT Yard in Norfolk, Virginia. We remanded the case, however, with directions to the district court (a) to prepare a plan for merger of the seniority roster, (b) to consider defendants' liability for back pay, and (c) to make an allowance for attorneys fees. On remand, plaintiffs sought to raise, as an additional issue, the contention that minimum wage guarantees made to certain N & W employees when Nickel Plate Railroad was merged with N & W should be extended to them.

The district court declined to consider an upward adjustment of plaintiffs' monthly guarantees by reason of the Nickel Plate merger

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plan on the ground that since the claim was not asserted until final argument of the case on remand, the assertion was untimely. It ruled that plaintiffs were not entitled to back pay and it formulated a plan for merging seniority rosters.[1] Plaintiffs appeal a second time, challenging the correctness of the denial of back pay, the merger of the seniority rosters for conductors, and the refusal to give effect to the Nickel Plate merger agreements. We find merit in plaintiffs' several assertions of error, and therefore we vacate the judgment in the respects it is challenged and remand the case for further proceedings.

I.

Because of the full statement of facts in the appeal previously reported, we proceed directly to the legal issues, reciting only such additional facts as are necessary for their full understanding. We consider first plaintiffs' claim to back pay.

Discrimination in hiring and employment practices has already been established in this case. Under the rule of Albemarle Paper Co. v. Moody, _____U. S. _____ (June 25, 1975):

> [G]iven a finding of unlawful discrimination, back pay

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1. It made other rulings also which we need not describe since they are not challenged on appeal.

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> should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. (Footnote omitted.) _____U. S. at _____.

See also Robinson v. Lorillard Corp., 444 F. 2d 791, 803-04 (4 Cir.), cert. dismissed, 404 U. S. 1006 (1971).

The district court advanced four reasons for denying back pay. They were: (a) that the rate of pay for each classification at the Barney and CT Yards was identical; (b) in 1968, N & W offered to dovetail the rosters of the two yards, but this offer was refused by the unions and must have been known and acquiesced in by plaintiffs; (c) while promotions to higher paying positions came more slowly to Barney Yard employees than to CT Yard employees, the disparity resulted from objective employment needs and personal choice on the part of Barney Yard employees; and (d) the two yards are separate and distinct.

With the possible exception of extension of the N & W minimum wage guarantees, we think that a general application of any or all of the district court's reasons for denying back pay would frustrate the eradication of discrimination and would prevent the victims of discrimination from being made whole for their injuries. Therefore,

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we think back pay must be awarded.

Although rates of pay at the Barney and CT Yards are identical, it is total income, not rate of pay, by which discrimination in compensation is measured. Rate of pay is only part of the equation which produces total income. The record reflects that there was significantly less opportunity for work and for promotion, and significantly greater possibility of layoff at Barney that that at the CT Yard. Such opportunities and possibilities are among the "terms and conditions" of employment. When they are unequal and one racially identifiable group is favored over another, racial discrimination in fact has been practiced.

That no Barney Yard men applied for CT Yard jobs does not disprove discrimination or foreclose the back pay remedy. Since Barney Yard men had no seniority rights to exercise in applying or bidding for CT Yard jobs, 473 F2d at 1346, a Barney Yard employee would be required to forfeit his accumulated seniority in order to obtain employment at the CT Yard. A refusal to commit seniority suicide is not an acceptable reason to deny back pay. Victims of discrimination should not be required to forfeit wage and security benefits accruing because of their seniority in order to remain eligible for purely speculative future back pay relief. A general rule requiring such action would frustrate the central purposes of Title VII.

Even if N & W did offer to dovetail seniority rosters in 1968, the fact is that dovetailing was not accomplished. Mere bona fides on the part of an employer, not translated into an actual

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eradication of discrimination, provides no defense to a claim for back pay. Albemarle Paper Co., _____ U.S. at _____; Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In any event, the record does not support the district court's suggestion that plaintiffs knew of the merger offer in 1968. There was affirmative testimony by representatives of the affected class that they had neither seen or heard of the offer, and a union official testified that it had not been communicated to the black union or its officers. Under Albemarle Paper Co., this purported justification is not a good defense.

The district court found that the disparate promotion rate between the two yards did not justify the back pay remedy. But as a result of "nepotistic" hiring practices, mostly blacks were hired at Barney and mostly whites at CT, and the system of seniority tended to lock blacks into Barney. See 473 F. 2d at 1346. In light of the racial pattern of employment at the two yards, the disparate promotion rate, regardless of the identity in pay rates for identical classifications at the yards, made employment at the Barney Yard unlawfully discriminatory.

Nor does the record support the explanation that black Barney employees did not seek promotion and remained at the Barney Yard as a matter of personal preference. The evidence shows that a substantial group of Barney employees accepted promotions at Barney Yard when vacancies occurred. More significantly, the record fails to show that any Barney Yard employee declined a promotion at Barney Yard when an opportunity for promotion arose.

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Because successful bidding on a job at CT Yard by a Barney Yard employee inevitably meant a loss of seniority, the failure to make such a bid by a Barney Yard employee could hardly be treated as a considered choice. In short, we see no reason to conclude that, if the promotion opportunities open to CT Yard men had been fairly available to Barney Yard men, the latter would have failed to take advantage of them.

Although the two yards are indeed separate and distinct operations, this fact is irrelevant to the back pay issue. At each yard the same general work is performed and both have the same job classifications, employment qualifications, and rates of pay. But because they are racially identifiable and less attractive employment opportunities are presented at the mostly black Barney Yard, there is unlawful discrimination warranting an award of back pay.

Of course we do not decide that each Barney employee is necessarily entitled to an award of back pay. The statistical evidence in the record tended to prove that certain Barney Yard employees fared better economically than their counterparts at CT Yard, and other Barney Yard employees, worse.

We approve the approach to the back pay computation developed in Johnson v. Goodyear Tire & Rubber Co., 491 F. 2d 1364, 1379-80 (5 Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211, 259-63 (5 Cir. 1974); and Baxter v. Savannah Sugar Refining Corp.,

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495 F. 2d 437, 443-45 (5 Cir.), cert. denied, ____ U. S. ____ (1974). These cases hold that to justify an award plaintiffs must prove that there is a class whose members suffered economic loss as a result of discrimination. Such proof would establish a prima facie claim to back pay for each member of the class.

The objective of an award of back pay is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co., ____ U. S. at _____. In the case at bar, therefore, the district court must calculate the economic consequences of hypothetical employment at the CT Yard, compare it with the economic consequences of actual employment at the Barney Yard and, if the economic consequences of hypothetical employment are larger than the economic consequences of actual employment, award the difference to the affected class member. To that end, each employee claiming entitlement to an award must establish his identity as a member of the class and must prove both is income during the years of discriminatory employment and the nature of his job. While much of this proof has already been adduced, plaintiffs should have the right to supplement it on remand, if they wish. The employer then should be afforded the opportunity to present proof that any particular class member is not entitled to back pay, for whatever reason: e.g., lack of qualification, free and voluntary decision to forego higher-paying work opportunities, lack of higher-paying work opportunities, and the like. If the employer establishes his defense by a preponderance of the evidence, then the member's prima facie

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case will be overcome and he should be denied back pay, or have his claim reduced, as the case may be. Otherwise, an award should be made in the amount that the proof establishes.

Some additional comments with respect to the award of back pay are required. N & W argues that because its good faith efforts to dovetail seniority rosters in 1968 were frustrated by the unions, any award of back pay should be assessed solely against the unions. The unions, on the other hand, argue vigorously that any back pay award should be solely against N & W and not against them, even in part.

We do not think that N & W can escape liability to plaintiffs for back pay. As we have said, irrespective of any good faith effort on the part of N & W to obviate the discriminatory effect of separate seniority lists in 1968, the fact is that the discrimination was not obviated; under Albemarle Paper Co., N & W's good faith efforts cannot insulate it from plaintiffs' claims. At the same time, 42 U.S.C. § 2000-5 (g) authorizes an award of back pay against an "employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice . . . ." It may well be that the unions should bear part of any back pay award. [1a]

1a. This is not an appropriate case in which to decide whether, consistent with Albemarle Paper Co., an employer may recover an entire back pay award from the union, and we do not

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As between N & W and the unions, Albemarle Paper Co. would not render a good faith effort by N & W to eliminate discrimination irrelevant to the question of which should bear what share of a back pay award. At the same time, consistent with the purposes of the Act, any judgment should be against N & W and the unions jointly and severally, or against N & W solely, with a right to partial indemnity from the unions so as to insure that there be an economic incentive for an employer to obviate discrimination voluntarily, rather than by court decree, and that an employee entitled to back pay shall be made whole by obtaining a judgment against a financially responsible party.

1a. (Continued)

decide the question. In the record before us, N & W must bear at least some responsibility for the failure to merge the seniority rosters. The question of merging the CT and Barney Yard rosters was first raised by the unions in August, 1967, but it was in the context that if the CT roster and the Virginian roster (a third seniority roster, not otherwise concerned in this litigation, resulting from a previous railroad merger) were "topped" and "bottomed" at an undetermined future date, consideration should be given to including the Barney Yard roster. At the same time, the unions took the position that the matter of integrating the rosters was an internal matter for the unions and N & W would be contacted when roster merger was desired. While N & W made some subsequent inquiries as to whether the unions were

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But, the question of whether the unions should bear part of the award for back pay is not ripe for adjudication. It has not yet been decided by the district court. The district court did not reach the issue since it erroneously concluded not to award back pay. Even if we assume that all of the proof relevant to the equitable considerations of a possible division of a back pay award has been adduced, the fact-finding function and the exercise of discretion are vested in the first instance in the district court. We defer to it for initial decision of this issue.

1a. (Continued)

prepared to consider the matter and received negative responses, it was not until October 31, 1968, that N & W wrote to the unions advising that it "propose[d] dovetailing of the seniority rosters" and requested a meeting "to effect this as soon as possible." Two meetings were held in November, 1968; and when the unions expressed opposition to dovetailing, N & W proposed that the rosters be merged by "topping" and "bottoming" effective December 1, 1968. N & W's proposal was not responded to by June 2, 1969, when the present suit was instituted. From all that appears, N & W, after abandoning dovetailing after two discussions and proposing "topping" and "bottoming" did nothing to further its amended proposal from November, 1968, to June 2, 1969. Its role appears to have been passive acceptance of the union's claim that resolution of the matter was solely a question of unions' internal management. If an employer may ever recover

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We state only that the decision of whether either or both of the unions is to share in N & W's liability for back pay depends upon whether they combined with N & W to deprive black employees of income opportunities. Carey v. Greyhound, Inc., _____ F. 2d _____, _____ (5 Cir., September 26, 1974); Guerra v. Manchester Terminal Corp., 498 F. 2d 641, 655-56 (5 Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F. 2d at 1381-82.

1a. (Continued)

an entire back pay award from the union on the theory that the union frustrated the employer's good faith efforts to bring about compliance with Title VII, the employer must demonstrate a more assiduous effort on its part to eliminate discrimination than has been shown here.

II.

Our mandate with respect to seniority in the earlier appeal was that seniority rosters in the two yards be merged. We directed that with respect to the right of Barney Yard brakemen to qualify for promotion to conductors, "any decree should, while protecting Barney Yard brakemen from prejudice in connection with promotion to this higher classification, not give such brakemen any higher or broader rights than those enjoyed or granted to CT Yard brakemen, who had qualified for promotion to conductors." 473 F. 2d at 1349.

In formulating a decree, the district court merged the two seniority lists and ranked conductor seniority on the basis of date of promotion to conductor. Only the merger of the lists with respect to conductors is questioned in this appeal. Plaintiffs contend that the merger effected by the district court preserves discrimination heretofore practiced with respect to two classes of conductors or potential conductors, i.e., Barney Yard brakemen hired before March 18, 1956, who have been promoted to conductor, and Barney Yard brakemen hired between March 18, 1956 and September 18, 1963 (the date by which every CT Yard brakeman had had an opportunity to be promoted to conductor), who have never had an opportunity to qualify as a conductor.

Plaintiffs contend that merger of the seniority lists with respect to these two classes of conductors and potential conductors should be on the basis of company seniority (date of hire as brakemen)

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where competition between Barney Yard conductors (both present and future) and CT Yard conductors is concerned, but that date of qualification as conductor should determine relative seniority among Barney Yard conductors (both present and future), on the one hand, and CT Yard conductors, on the other hand.[2] N & W is neutral in the dispute and specifically disclaims any valid business reason to prefer plaintiffs' plan of merger over the merger effected by the district court and supported by the unions, or vice versa. We think that for the two affected classes, plaintiffs' merger of the seniority rosters should be decreed, subject of course to actual qualification as conductors by those Barney Yard brakemen hired between March 18, 1956 and September 18, 1963, who have never had the opportunity to qualify for conductor.

To understand our conclusion, additional facts should first be stated. In both yards, when N & W determines the need for additional conductors, brakemen have the opportunity to qualify in the order of their brakemen seniority.

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2. Plaintiffs' proposed merger proscribes displacement of incumbents and limits seniority competition to future vacancies.

Since the need for conductors in the particular yard fluctuates, the length of time brakemen must be employed as brakemen before having the opportunity to bid for promotion also varies.

The record reflects that CT Yard brakemen gained the chance to promote to conductors far more rapidly than Barney Yard brakemen. By April, 1971, every CT Yard brakeman hired on or before September 18, 1963, had been offered the opportunity to be promoted to conductor. Most CT Yard brakemen hired before 1964 were promoted to conductor after 6-7 years as brakemen--three within three years. No Barney Yard brakeman hired after March 18, 1956, had, by April 1971, any opportunity to become a conductor. Most Barney Yard brakemen who had received a chance to be promoted waited a period of 8-15 years after first employment as a brakeman to receive an opportunity to bid for promotion.

Because Barney Yard brakemen have enjoyed fewer and slower opportunities for promotion to conductor, all Barney Yard brakemen hired between March 18, 1956, and September 18, 1963, who have never had the opportunity to qualify as conductors, as have CT Yard brakemen hired in this period, and those Barney Yard brakemen hired before March 18, 1956, who have been promoted to conductor, carry a later seniority date than similarly situated CT Yard conductors.

Given the discrimination in employment between the two yards as found by the district court and affirmed in the first appeal, reinforced by the additional facts that we have

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recited, we think that the district court's merger of the seniority rosters with respect to conductors of the affected classes (both present and future) will preserve and perpetuate past ciscrimination. Present Barney Yard conductors of the affected class will forever suffer a loss of seniority compared to their CT Yard counterparts. Barney Yard brakemen of the affected class who may hereafter qualify as a conductor can never overcome the disadvantage in seniority that that discrimination inflicted. The case strongly resembles United States v. Chesapeake & Ohio Railway Co., 471 F. 2d 582, 588-89 (4 Cir.), cert. denied, 411 U.S. 939 (1973), where we held that "topping and bottoming" was not an adequate remedy to eliminate the racial discrimination that initially barred them from becoming conductors. In short, the proposed means of merging the conductors' seniority lists fails to effectuate our prior mandate in this case to protect "Barney Yard brakemen from prejudice in connection with promotion to [conductors]." 473 F. 2d at 1349.

The plaintiffs propose their own merger plan and the union advocates that adopted by the district court; N & W says either is feasible. Others may be devised, but we do not stop to construct them. They were not presented to the district court and they are not urged on appeal. Because of the complexities of the issue, we prefer not to go beyond the alternatives which N & W says are workable.

We think that plaintiffs' proposed merger of seniority rosters would be in accord with our prior mandate. It will redress discriminatory loss of seniority on the part of Barney Yard

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conductors in one of the affected classes, and it will make possible nondiscriminatory promotion of Barney Yard brakemen in the other affected class--all without giving members of either class any broader or greater rights than those possessed by CT Yard conductors. On remand, the district court will amend its decree in this respect accordingly.

III

Finally, we turn to the assertion that minimum wage guarantees made to certain N & W employees in 1964 when Nickel Plate Railroad was merged with N & W should be extended to certain of the plaintiffs. As part of the merger agreement N & W and the unions agreed that each yardman employed by N & W as of October 1964 would be guaranteed the same level of average monthly earnings as he enjoyed in the one-year period immediately prior to the merger. The minimum wage guarantee agreement is not applicable to yardmen hired after October 16, 1964. The Interstate Commerce Commission adopted this agreement in approving the merger. Under the agreement each N & W yardman submits a claim for additional compensation showing his "test" wage and his actual earnings for the month pertinent to the claim. If his actual earnings are less than his "test" wage, he must assert his availability for more work had it been available, and overall the computation must show the amount due him, i.e., the difference between guaranteed wage and actual earnings. If the employee failed to accept work that he would otherwise have received, his claim to the minimum wage is forfeited to the extent that he declined to work.

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With respect to Barney Yard brakemen whose opportunities for work and for promotion at the Barney Yard were less than those of their counterparts at the CT Yard, we have previously shown that they have suffered discrimination which is reflected in their total compensation. In any month in which there was insufficient work for all yardmen at both yards, Barney Yard men employed prior to October 16, 1964 suffered further discrimination in that their guaranteed monthly wage was less that the guaranteed monthly wage of their counterparts at the CT Yard. It follows, we think, that to redress fully the discriminations which have been practiced against it, this group should be treated as if the minimum wage guarantee had extended to it. This is only a ramification of our general holding that the back pay awards due Barney Yard men should be measured according to what they would have earned had they been employees at the CT Yard prior to October 16, 1964. See Bowe v. Colgate, Palmolive Co., 489 F. 2d 896, 903-04 (7 Cir. 1973); Peters v. Missouri-Pacific Railroad Co., 483 F. 2d 490, 498-99 (5 Cir.), cert. denied, 414 U. S. 1002 (1973); Rosen v. Public Service Electric & Gas Co., 477 F. 2d 90, 95-96 (3 Cir. 1973).

Albemarle Paper Co. v. Moody, _____ U. S. _____ (June 25, 1975); Griggs v. Duke Power Co., 401 U. S. 424, 430 (1971), and our decisions in Chesapeake and Ohio Railroad Co. and Robinson establish that Title VII requires elimination of all continuing effects of past discrimination. Subject only to our later discussion that Barney Yard employees' prosecution of this aspect of their claim to back

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pay may have prejudiced the parties liable therefor to the extent that recovery should be denied, we think that application of the Nickel Plate Merger Agreement to increase monthly guarantees to Barney Yard employees equivalent to guarantees granted CT Yard employees of comparable seniority falls within the scope of settled law.

The district court declined to consider the claimed extension of the Nickel Plate Merger Agreement on the ground that the claim was untimely, saying "[a]t no time prior in the four-year record of this case before this Court has there been any mention of guarantees under the Nickel Plate Merger Plan, that is, until February 8, 1974, or final argument of the matter on remand. We deem it inappropriate to move to new material at this late date." _____F. S. at _____.

Before us, N & W argues that Barney Yard employees must have known before the first remand of the guarantees made to CT Yard men, but Barney Yard employees did not assert the claim until N & W invoked the Nickel Plate Minimum Compensation Agreement to support its argument that a provision should be included in the dovetailed seniority lists prohibiting N & W from requiring a CT Yard employee to work at the Barney Yard even if there were no work available at the CT Yard. N & W thus urges the correctness of the district court's treatment of the issue.

In Albemarle Paper Co., the district court denied a claim for back pay, inter alia, because it was not asserted until five years after the

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complaint was filed and the employer was thereby "prejudiced." The Court held that "a party may not be 'entitled' to relief if its conduct of the cause has improperly and substantially prejudiced the other party . . . . To deny back pay because a particular cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII." ____U.S. at _____. In that case the issue was remanded to the district court for a specific determination of "[w]hether the petitioners [employers] were in fact prejudiced, and whether the respondents' [employees'] trial conduct was excusable . . . ." _____U.S. at _____. Thus, Albemarle recognizes that a claim for back pay may be forfeited if it is inexcusably pressed under such circumstances as prejudice the employer.

Aside from its statement that in view of the district court plaintiffs were late in asserting any claims arising from the Nickel Plate Minimum Compensation Agreement, the factual bases on which a late back pay claim may properly be denied were not considered. Specifically, the district court made no finding of whether lateness, if that be found, was excusable and, if not, whether N & W was prejudiced. As in Albemarle Paper Co., these are questions for the district court in the first instance and should be considered on remand. We will remit them to the district court, cautioning only that Albemarle Paper Co teaches "[i]t is necessary . . . that if a district court does decline to award back pay, it carefully articulate its reasons." ____U.S. _____ at _____, n. 14.

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Accordingly, we hold that, unless it be found that the circumstances of assertion of the claim have been prejudicial to N & W such as to warrant barring its allowance, in the computation of back pay for Barney Yard employees the Nickel Plate Merger Agreement be given effect and that employees be entitled to back pay to the extent that they can demonstrate that they failed to earn the minimum wage guarantees afforded their counterparts at the CT Yard.

VACATED AND REMANDED.

WIDENER, Circuit Judge, concurring and dissenting:

I

I am in general agreement with the majority as to part II of its opinion that the "date of promotion to conductor" should not govern in the dovetailing of the seniority lists of the Barney and CT Yards. But I do not believe the dovetailing should be done on the basis of the "date of hire as brakeman," for so doing is in the face of our previous opinion quoted by the majority which directs the district court not to " . . . give such brakemen any higher or broader rights than those enjoyed or granted to CT yard brakemen who had qualified for promotion to conductors." 473 F. 2d at 1349.

I would give all the Barney Yard brakemen the same opportunity to qualify as conductor as their CT Yard counterparts based on the latest date of promotion to brakeman of a CT Yard employee who has qualified for conductor, And then, with

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such qualifications accomplished, I would require the district court to match the two conductor lists, Barney and CT yards, one against the other, and for all of the conductors then qualified, equitably to dovetail the lists, taking care to give consideration to date of hire as brakemen, as well as date of promotion to conductor, correct any lack of opportunity to qualify as conductor, consider whether or not the employee previously aspired to conductor status, etc., and to create no "higher or broader rights than those enjoyed or granted to CT yard brakemen." It is true that in many or even most cases the date of qualification to brakeman might govern, but is is equally true that employees who did not previously wish to be promoted for one reason or another would not now receive super seniority in a position to which they did not previously aspire. The object of dovetailing is to correct the inequality of opportunity. When that has been accomplished, the court has no further function.

II

Our previous opinion in this case, 473 F. 2d 1344, was handed down February 13, 1973. Throughout the first trial of this case, filed in 1969, and throughout the second trial of the case, after remand, no claim was made by the plaintiffs under the Nickel Plate Merger Plan until January or February 1974 on final argument of the matter. Well after all the evidence had been taken in the case, the court was asked to consider this separate contract. Indeed, it is not even in the record. I think the district judge did not abuse his discretion in declining to consider a contract, not even a part of the record, which was never

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introduced into evidence and only alluded to after the completion of two trials and almost five years after the filing of the case. Discretion in such matters must be placed in the hands of the trial judges who should be reversed only for abuse of discretion. I do not find a scintilla of evidence from which abuse may be inferred.

III

(A)

I had thought and still think that if there should be an award of damages it ought to be broken down in discussion between the period prior to the October 31, 1968 offer to dovetail, later referred to, and the period subsequent to that time. Since the majority opinion, however, apparently is based entirely on the failure of the railroad to dovetail, my dissent will also point largely to that subject.

With reference to the majority finding that an award of back pay is justified because "it is total income, not rate of pay, by which discrimination in compensation is measured," this is only another way of saying that since the average income of Barney yard employees was less than that at the CT yard, an award of back pay is necessarily required. As it has been pointed out to us in dozens, or even hundreds, of instances,[1] Barney yard employees

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1. Only a small example is here copied from the brief of N&W, which is fully supported by the record, but is not considered by the

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Fn. 1 continued -

majority:

"In 1966 ten Barney Yardmen earned more gross pay than CT Yardmen with substantially identical dates of hire. In 1967 twenty-seven Barney Yardmen earned more gross pay that CT Yardmen with substantially identical dates of hire. In 1968 thirty-one Barney Yardmen earned more gross pay than CT Yardmen with substantially identical dates of hire. In 1969 thirty-four Barney Yardmen earned more gross pay than CT Yardmen with substantially identical dates of hire. In 1970 forty-three Barney Yardmen earned more gross pay than CT Yardmen with substantially identical dates of hire. In 1971 twenty-eight Barney Yardmen earned more gross pay than CT Yardmen with substantially identical dates of hire. In 1972 twenty-three Barney Yardmen earned more gross pay than CT Yardmen with substantially identical dates of hire. In 1973 twenty-two Barney Yardmen earned more gross pay that CT Yardmen with substantially identical dates of hire."

with no more, or even less, seniority earned more in a given period than CT yard employees. These undisputed facts alone should be sufficient to prevent the majority from painting with the broad brush of averages and if there should be an award of damages to limit it to those Barney yard employees who were in fact denied advancement prior to October 31, 1968 because of lack of opportunity for advancement at the Barney yard, as well as to those who suffered financial disadvantage in fact by virtue of Barney yard employment. [1a]

(B)

I am of the opinion the holding of the majority, that an across the board back pay award against the railroad is necessary and required in this case as a matter of law, is not only unsupported by the record in fact, it is contrary to recognized legal principles and is a reading of Albemarle Paper Company unsupported by that opinion.

1a. I have not attempted to voice my disagreement with each point of the majority opinion with which I am not satisfied, but one other should briefly be mentioned here. It seems that shifting the burden of proof to a defendant and compelling a finding by establishing a prima facie case is contrary to Wright v. Rockefeller, 376 US 52, 57 (1964).

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A principal error of the majority is its refusal to apply the clearly erroneous rule of FRCP 52(a) to this case, although such is the express command of Albemarle Paper Company, 43 LW 4880, 4886. As the court there notes, "[o]n these issues of procedural regularity and prejudice the 'broad aims of Title VII' provide no ready solution." Thus, the Supreme Court, in its very latest opinion Title VII case, affords no procedural preference to Title VII actions, and includes specifically "whether the District Court was 'clearly erroneous' in its factual findings." 43 LW 4880, 4886.

The finding of fact of the district court that the railroad offered, on October 31, 1968, to dovetail the Barney Yard and CT yard rosters is amply supported by the record, and any suggestion by the majority that it did not is simply contrary to all the evidence. The holding by the majority that the record does not support the district court's suggestion that the plaintiffs knew of the merger offer in 1968 is also, I submit, contrary to the record and to the clearly erroneous standard of review prescribed by Albemarle. I also find unjustified the absence of reference in the majority opinion to the unassailed finding of fact by the district court that "The [October 31, 1968 dovetailing] proposition was turned down by the Unions."

The railroad, on October 31, 1968, wrote the following letter to M. Y. Lusk:

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"Dear Mr. Lusk:

Please refer to your letter of August 30, 1967, File No. 13/16-58, and conferences October 2 and 19, 1967, January 4 and 22, and February 1 and 16, 1968, concerning Barney Yardmen, Norfolk Terminal.

We propose dovetailing of the seniority rosters of Barney Yardmen and Norfolk Terminal Yardmen and would appreciate it if you would arrange to meet with us at your earliest convenience to effect this as soon as possible.

Please advise.

Very truly yours,

(s) E. A. Manetta

Vice-President-
Personnel"

Lusk was the General Chairman of the union for the Norfolk and Western employees involved in this case, including all of the Barney yard employees, and it must be remembered that the focus of the entire case as we now have it is on the merger of the mostly black local No. 974 with the mostly white local No. 550.[2]

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2. I express no opinion on whether or not the unions are in fact liable to the plaintiffs. But,

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Fn. 2 continued -

since the railroad in fact made a bona fide offer to do, in 1968, the same thing we now command it to do in 1975, it is nothing less than injustice to mulch it for damages based on any lack of knowledge of the 1968 offer on the part of the class plaintiffs. Such lack of knowledge, if any, is bound to be based on their own international and local officials not imparting knowledge of the offer to them.

Lusk negotiated for the Barney yard and CT yard employees with respect to the merger of the two locals from time to time over a period of months from at least 1967 until after this case was filed. Not only did Lusk receive the letter, it was brought to the attention of F. A. Hardin, an International Vice-President of the union who had been brought into the negotiations. The district court found as a fact that this was a bona fide offer, and the majority opinion points to no evidence to the contrary.

Robert Rock, one of the named plaintiffs, was local chairman of Local No. 974 throughout, and attended the numerous meetings concerning the merger of the rosters which took place during 1967 and 1968. Even discarding the balance of the voluminous evidence from which the district court could draw inferences, Lusk testified, in response to a question as to whether he had told the officials of Local 974 that he had the letter: "I think the letter, while not officially presented, was known." Among other meetings Rock attended attempting to negotiate terms of merger was one in November 1968, just following the receipt of the letter by Lusk. The record also shows various communications from one Peanort, secretary-treasurer of Local 974, during times pertinent to the question here. Peanort also attended various conferences with respect to the very question, as did one Haynes, the president of Local 974. The fact is that the question of dovetailing was never seriously considered by the unions involved because it would have necessarily resulted in displacement of seniority, although topping and

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bottoming, a system under which each yard's employees would go at the bottom of the other yard's seniority list, thus getting ahead of all new employees in both yards, while preserving seniority in their own, received much discussion and letter writing between the officers of Local 974, including Rock, and the railroad.

So the crediting by the majority of testimony of representatives of the affected class that they had neither seen nor heard of the offer and its casting aside the perfectly well supported findings of fact by the district judge is quite beyond comprehension. Especially in view of the fact that a copy of the October 31, 1968 proposal of dovetailing was filed with a motion to dismiss on July 21, 1969, and necessarily known to the plaintiffs' attorneys in this case and also to the plaintiffs, the testimony of Rock, Peanort and Haynes that they had not seen the letter until 1971 and the testimony of Rock and Haynes that they had not heard of it seems not only suspicious but may approach the inherently incredible. The finding of the district judge that he doubted the testimony and found it "hard" "to believe" was obviously a euphemism.[3]

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3. Since I believe correct the finding of fact that the class plaintiffs had actual knowledge of the 1968 offer, I need not reach the valid legal proposition that they are nevertheless bound by the knowledge of their representatives in a contest with the railroad. In a contest with the union, of course, they would not necessarily be bound.

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The finding of fact by the district judge that the proposition contained in the October 31st letter "was turned down by the Unions" is fully and amply supported by the testimony of at least Lusk and Hardin, which the district judge had a right to credit. And his following findings of fact and law that "[i]n 1968, they, as rank and file members, simply did not want to voluntarily chance a loss of seniority by any dovetailing of rosters, and they ought not to be allowed back pay now for something they opposed then," is equally supported by the record and common justice.

The majority's crediting witnesses not credited by the district judge; finding facts not found by the district judge; and discarding facts found by the district judge; especially when the district judge saw the witnesses and heard them testify, is to me a flagrant disregard of FRCP 52(a), not to mention the recent express command of the Supreme Court in Albemarle Paper Company.[4]

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4. Assuming the union official mentioned on p. 6 of the slip opinion was Hardin, I note in passing his testimony was that he did not tell the "members of 974" he "had knowledge of such a letter." But the majority here, in all events, is not allowed to select such evidence as it believes and credit it; that is a function of the district court.

Believing as I do that the findings of the district court are amply supported by the record makes all the more remarkable to me the holding of the majority that the railroad may not "escape" from any back pay award, and that "any judgment should be against N&W and the unions jointly and severally or against N&W solely." This holding is pegged on two propositions. The first is that mere good faith efforts by an employer to bring about compliance are not enough to escape liability; and the second is that the judgment must be against "a financially responsible party."

The proposition that good faith efforts of the railroad to bring about complaince are not enough is explained in footnote 1(a) in which it is stated "[t]he employer must demonstrate a more assiduous effort" than has been presented here in order to escape liability for back pay. Referring back to the letter of October 31, 1968, we see that it is unconditional and undenied, and that it was rejected by Local 974, one of the plaintiffs in this case and the representative of the individual and class plaintiffs. How an employer can make a more "assiduous effort" than to make an unconditional offer is something I find difficult to understand. And neither the majority opinion, nor briefs, nor argument have suggested anything the railroad could have done other than to make an unconditional offer.

In this connection, it is well to remember, as mentioned by Judge Field in his dissent in the allied case of Williams, et al v. Norfolk & Western Railway, No. 74-1549, that the railroad is governed by the provisions of the Railway Labor

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Act, 45 USC §152 Seventh and §152 Tenth, which not only provide that no carrier shall change the working conditions of its employees other than in a manner prescribed by the statute, but also provides criminal penalties for any violation. So the suggestion of the majority that the railroad should have taken unilateral action, I think, cannot be supported as a matter of law. Along the same line, our opinion in Moody v. Albemarle Paper Company, 474 F. 2d 134 (4th Cir. 1973), that back pay should ordinarily be awarded unless special circumstances should render such an award unjust, takes into account in note 5 cases involving employers complying with a rule of state law. Why an employer may be exempted from liability under some circumstances by complying with a state law and condemned to liability for complying with a federal law is an inconsistency I do not think acceptable, and no reason exists to fashion such a distinction.

Finally, I protest the reasoning of the majority that an award should be made against any party in any lawsuit because it is financially solvent. This is a kind of Robin Hood justice which I do not and may not subscribe to.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
74-1788

The United Transportation Union Local No. 974, AFL-CIO,

Plaintiff

v.

Norfolk and Western Railway Company, a corporation; United Transportation Union, Lodge No. 550, an unincorporated association; United Transportation Union, an unincorporated association,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

Upon consideration of the petitions for rehearing filed in the above case, by counsel,

IT IS ORDERED that Judge Winter and Judge Craven deny the petitions for rehearing. Judge Widener would grant rehearing for the reasons set forth in his dissenting opinion.

For the Court-by Direction
/s/ William K. Slate, II
Clerk

Filed December 1, 1975.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 74-1788

The United Transportation Union Local No. 974, AFL-CIO, an unincorporated association,

Plaintiff

Robert Rock, Ezell B. Johnson, Russell C. Walker, each individually and on behalf of all others similarly situated,

Appellants

versus

Norfolk and Western Railway Company, a corporation; United Transportation Union, Lodge No. 550, an unincorporated association; United Transportation Union, an unincorporated association,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

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Upon consideration of the motion of the appellees, by counsel and for cause shown,

It is ORDERED that the judgment in lieu of the mandate be, and the same is hereby, recalled; that the Clerk of the United States District Court for the Eastern District of Virginia, at Norfolk, is directed to return to the Clerk of this Court the certified copy of the judgment issued in lieu of the mandate and that the mandate be stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by law.

For the Court - by direction

/s/ William K. Slate, II
Clerk

Filed December 11, 1975